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In The Supreme Court of the United States

OFFICER BRIAN MARTIN, OFFICER JASON BROWN, OFFICER SCOTT STRAUB, SERGEANT TIM SELVIA, SERGEANT KEVIN HUNTER, LIEUTENANT KEVIN ZELT, DEPUTY CHIEF MARTIN A. BENDER, and DEPUTY CHIEF DOUGLAS A. LUCKER, each in his individual capacity,

Petitioners,

v.

ESTATE OF RUDY ESCOBEDO (Deceased), RAQUEL HANIC, Personal Representative of Estate,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit erred in creating a new standard for qualified immunity which only requires a plaintiff demonstrate that a jury could find the conduct of the police to be reckless or even unreasonable in order to avoid summary judgment, departing from this Court's qualified immunity precedent under which civil rights defendants are entitled to fair warning that their actions violate clearly established law.

2. Whether the law was clearly established at the time of the incident that police officers on an emergency services team deployed to respond to an armed and suicidal suspect who had barricaded himself in a high rise apartment building were prohibited by the Fourth Amendment from using more than a specific amount of tear gas to drive the suspect from the apartment.

3. Whether the law was clearly established at the time of the incident that police officers on an emergency services team deployed to respond to an armed and suicidal suspect who had barricaded himself in a high rise apartment were prohibited by the Fourth Amendment from using flash bang devices to drive the suspect from the apartment.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a Writ of Certiorari to review the judgment of the U.S. Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Opinion of the U.S. Court of Appeals for the Seventh Circuit, dated April 5, 2010, is officially reported as *Estate of Escobedo v. Bender, et al.,* 600 F.3d 770 (7th Cir. 2010), *reh'g en banc denied* and is reproduced at App. 1-44. The Opinion of the U.S. District Court for the Northern District of Indiana, dated May 5, 2008 is unreported and is reproduced at App. 45-153. The Order denying en banc review by the U.S. Court of Appeals for the Seventh Circuit, dated May 12, 2010, is reproduced at App. 154-155.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Seventh Circuit sought to be reviewed was entered on April 5, 2010. The petitioners timely filed a Petition for Rehearing, With Suggestion For Rehearing En Banc on April 19, 2010. The order denying rehearing was entered on May 12, 2010. The petition is timely under 28 U.S.C. §2102(c) and Supreme Court Rules 13.1 and 13.3 because it is being timely filed within 90 days after the denial of a timely petition for rehearing. This Court has jurisdiction to review the

judgment of the U.S. Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The respondents seek damages for the alleged violation of Rudy Escobedo's Fourth Amendment rights pursuant to 42 U.S.C. §1983. The Fourth Amendment to the United States Constitution provides that "[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

Title 42, Section 1983 of the United States Code provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . , subject, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

The Seventh Circuit virtually abandons the "fair and clear warning" standard for qualified immunity espoused by this Court in *Brosseau v. Haugen,* 543 U.S. 194, 198 (2004) and *Hope v. Pelzer,* 536 U.S. 730, 746 (2002). The closely analogous case standard for determining whether the law is clearly established is abandoned in favor of general legal propositions and dicta. Moreover, the repeated references to whether the officers acted "unreasonably" creates a new standard for qualified immunity which is in direct contravention to the standards previously established by this Court.

The Seventh Circuit's Opinion, if allowed to stand, substantially reduces a plaintiff's burden to demonstrate that the law was clearly established by coming forward with closely analogous cases which would provide officers with fair and clear warning that their conduct exceeds constitutional bounds and is forbidden. If unreviewed, this decision will also have a chilling effect upon police officers across the nation, as they will be left to guess as to whether Courts will later determine their conduct was unconstitutional even where no Court has ever before held such conduct to be illegal. Avoiding this chilling effect on law enforcement officials was precisely what the defense of qualified immunity was intended to combat.

Moreover, this is a case of first impression for this Court as this Court has never expressed an

opinion on the use of tear gas or the use of flash bangs by police officers, two often-used, non-lethal tactics employed by police officers throughout this country to extricate non-compliant suspects from buildings after unsuccessful negotiations for voluntary surrender. Indeed, the District Court itself observed that "no very similar case could be found where using tear gas was considered a violation of a person's rights." (App. 115).

As to the use of tear gas, the Seventh Circuit's Decision acknowledges the lack of any controlling precedent from the Seventh Circuit as to the use of tear gas under the circumstances here. Nevertheless, the Court concluded that the petitioners had fair warning that their use of tear gas to extricate a person high on cocaine, in possession of a gun, threatening to kill himself, who had barricaded himself in a high rise apartment building after hours of unsuccessful negotiations to secure his voluntary surrender was constitutionally forbidden. The Seventh Circuit's decision, if left unreviewed, will have a chilling effect upon police officers who undoubtedly will be regularly faced with situations calling for the use of tear gas in the future throughout the nation.

The Seventh Circuit's majority opinion that the use of flash bang devices was constitutionally forbidden under the circumstances presented here also represents a significant departure from traditional qualified immunity analysis. The Majority Panel Opinion cites no United States Supreme Court or

Seventh Circuit decision that squarely governs the unique situation facing the officers here so as to give them fair warning that their use of flash bang devices under the circumstances violated Escobedo's constitutional rights. Judge Manion's vigorous dissent astutely observes that under the circumstances presented, "the flash bang devices may have been their safest option," as the officers were dealing with an individual who was high on cocaine, had a gun, had threatened to kill himself, and was barricaded inside of his apartment. (App. 44).

For purposes of certiorari, petitioners focus their attention on the supervising officers' decision to use tear gas to extricate Escobedo from his apartment, implementation of that decision by members of the Emergency Response Team ("ERT"), as well as the supervising officers' decision to use flash bangs to protect members of the ERT during entry into Escobedo's apartment and bedroom, and implementation of that decision.

A. The 911 Call

On July 19, 2005, at approximately 4:24 a.m., Escobedo called 911 and told the dispatcher that he was in his apartment, high on cocaine, with a loaded gun pointed to his head, and that he was going to kill himself. (Doc. 37-28). Escobedo's apartment was on the 7th floor of an apartment building located at 530 W. Berry Street in downtown Fort Wayne. This apartment faces the entrance to St. Joseph Hospital.

After receiving Escobedo's call, dispatch contacted Sergeant C.M. Taylor ("Sgt. Taylor") at 4:38 a.m. and he drove to the apartment building. (Doc. 37-26, p. 2). Sgt. Taylor established telephone communication with Escobedo at approximately 4:55 a.m. Escobedo told Sgt. Taylor he had a .45 gun to his head. (Doc. 37-27, pp. 4-5).

Sgt. Taylor made a decision to call out the Crisis Response Team ("CRT") as well as ERT. (Doc. 37-27, pp. 2-3). Eventually, Officer Bernie Ebetino ("Officer Ebetino"), a certified negotiator from CRT arrived, and Officer Ebetino took over telephone negotiations with Escobedo. (Doc. 37-7, pp. 2, 10; Doc. 37-8, pp. 1-2).

Deputy Chief Bender arrived as commander-in-charge of the scene at approximately 5:28 a.m. (Doc. 37-17, p. 12). Sgt. Hunter, the CRT commander and Lt. Zelt, commander of the ERT, also arrived on the scene. Members of the ERT included Officer Brown, Officer Martin, Sgt. Lee, Sgt. Selvia, Officer Straub and Officer Westfield as they arrived. (Doc. 37-15, p. 12).

B. Decision To Use Non-Lethal Force

Sometime around 8:00 a.m., Deputy Chief Bender, Lt. Zelt, and Sgt. Hunter commenced a discussion about the use of tear gas to force Escobedo from his apartment because the protracted negotiations were not going well. (Doc. 37-13, p. 3). Lt. Zelt came up with the plan to introduce tear gas as it

is standard procedure when negotiations are not successful. (Doc. 37-13, p. 11; Doc. 37-16, pp. 1-2).

Deputy Chief Bender agreed with Lt. Zelt's suggestion to use tear gas. (Doc. 37-17, pp. 13-15). Sgt. Hunter also agreed with the decision to introduce tear gas. (Doc. 37-13, pp. 10-12). As Escobedo was not voluntarily leaving his apartment, the officers needed to secure Escobedo and take him to a hospital. (Doc. 37-13, p. 12).

After the group discussion, Deputy Chief Bender told Lt. Zelt to proceed with preparations for the use of tear gas. (Doc. 37-17, p. 15). Lt. Zelt decided to first shoot tear gas through a window in the apartment, in hopes that the tear gas would force Escobedo out of the apartment. (Doc. 37-16, p. 5).

Lt. Zelt ordered 12 gas rounds from a .37 millimeter gun, and 5 gas rounds from a .12-gauge shotgun. (Doc. 37-16, p. 4). Officer Brown, along with Officers Albert Davis and Juan Barrientes, were assigned to deploy the tear gas through the apartment windows. (Doc. 37-2, p. 4). The three officers fired the rounds up into the apartment windows from ground level. The first round of gas into the bathroom was introduced at 8:33 a.m. Lt. Zelt directed all of the officers to wait 10 minutes, to see if Escobedo would come out of the apartment. There was no response. (Doc. 37-16, p. 5). As a result, Lt. Zelt ordered the officers to fire the remainder of the rounds of gas at 8:43 a.m. (Doc. 37-16, p. 6). Everyone waited another 10 minutes. (Doc. 37-16, p. 7).

C. Decision To Enter The Apartment

After waiting 20 minutes for Escobedo to come out of the apartment, Lt. Zelt directed Sgt. Selvia to get the entry team up to the front door of the apartment, open it, and introduce two "clear out" canisters. (Doc. 37-16, pp. 7-9).[1] This occurred at 8:52 a.m. When the initial round of gas was deployed, Sgt. Selvia yelled several times for Escobedo to come out with his hands up, but received no response. (Doc. 37-11, pp. 8-9).

From the command post, Lt. Zelt instructed Sgt. Selvia and his team to breach the apartment door. (Doc. 37-11, p. 10). Officer Westfield breached the apartment door by using a one-man ram. (Doc. 37-5, pp. 4-5). Officer Westfield opened the door enough so that the clear-out canisters could be thrown in. (Doc. 37-10, p. 4).

Lt. Zelt directed the use of a clear-out canister through the front door to see if Escobedo would come out. (Doc. 37-11, p. 11). Sgt. Selvia threw the first clear-out canister through the front door and waited for a response from Escobedo. No response was received. (Doc. 37-11, p. 12). Lt. Zelt ordered a second clear-out. Sgt. Selvia deployed a second canister of

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[1] Clear-out is a hand-held device that dispenses gas into a room and causes irritation of the sinuses and eyes, which often results in the barricaded person coming out and surrendering to officers. (Doc. 37-11, pp. 3-4).

clear-out and once again waited, with no response. (Doc. 37-11, pp. 12-13).

The plan was to throw a flash bang grenade into the apartment to distract and disorient Escobedo in order to give officers time to move through the doorway. (Doc. 51-11, pp. 43-44). The fear is that a person planning an ambush need only aim his weapon at the doorway to hit any officer who tries to enter the apartment. (Doc. 37-11, p. 6). When the flash bang grenade explodes, it yields an intense light and extremely loud sound. (Doc. 37-11, p. 5). It is standard practice or procedure to deploy flash bang grenades when officers enter a barricaded room. (Doc. 51-11, p. 44). As there was no response to the two clear-outs, a flash bang device was thrown into the apartment. (Doc. 37-11, p. 13).[2]

After clearing the main room in the apartment, Sgt. Selvia found the bedroom door barricaded. (Doc. 37-11, p. 15). Sgt. Selvia stood near the bedroom door and stated, "We know you're in there, you need to come out." (Doc. 37-11, pp. 14-15). It was difficult to open the bedroom door because it was heavily barricaded with furniture behind the bedroom door. (Doc. 37-10, p. 7). Once the door was opened slightly,

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[2] A flash bang is a distraction device designed to distract a suspect so that officers can make entry into a room. There is a flash which temporarily blinds the suspect and the bang temporarily deafens the suspect. The objective of a flash bang is to give officers 1½ to 3 seconds of distraction time. (Doc. 37-16, pp. 12-13).

a flash bang device was delivered into the bedroom. (Doc. 37-6, pp. 9-10).

D. Escobedo Points Gun At Officer Martin

When the ERT members entered the bedroom, they heard Escobedo say he had a gun. (Doc. 37-2, p. 8; 37-4, p. 10; 37-5, p. 10). Officer Martin saw Escobedo sitting toward the back of the bedroom closet, with his feet out in front of him. Escobedo was looking at Martin and had the gun in his left hand, positioned upside down, pointed at the side of his head. (Doc. 37-2, pp. 10-12). Officer Martin ordered Escobedo to drop the gun. (Doc. 37-2, p. 14; 37-3, pp. 8-9). Officer Martin observed Escobedo begin to lower the gun from his head, and point it directly at him. (Doc. 37-3, p. 1). In response to Escobedo pointing the loaded gun at him, Officer Martin fired his gun. (Doc. 37-3, pp. 3-5).

Officer Brown, who was armed with the Sage, saw Escobedo sitting in the closet, holding the gun to his head, in his left hand. Officer Brown observed Escobedo lower the gun from the side of his head and point the gun directly at Officer Martin. (Doc. 37-4, pp. 13-15). Officer Brown fired the non-lethal shots from his Sage in response. (Doc. 37-4, pp. 15-17).

Escobedo died from multiple gunshot wounds.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari for three (3) reasons. First, the Seventh Circuit's decision applies a constitutionally impermissible legal standard in denying qualified immunity to the petitioners, relying upon general legal propositions and dicta, rather than closely analogous cases. The Seventh Circuit's qualified immunity analysis as to both the use of tear gas and flash bangs cites not one single case wherein the facts had substantial similarity to those presented here. Despite the lack of any cases giving fair and clear warning that the conduct at issue violated clearly established rights, the petitioners were denied the qualified immunity protection they rightfully deserved. The lesser standard, if allowed to stand, jeopardizes two of the founding tenants of qualified immunity espoused years ago in *Malley v. Briggs*, 475 U.S. 335, 341-43 (1986) to give "ample room for mistakes in judgments" and to afford protection to "all but the plainly incompetent or those who knowingly violate the law."

Second, a writ of certiorari is warranted as to the use of tear gas when dealing with an individual like Escobedo, because the law was not so clearly established that all reasonable officers would know it was constitutionally forbidden to use tear gas to extricate a person high on cocaine, in possession of a gun, threatening to kill himself, and who had barricaded himself in a high rise apartment building after hours of unsuccessful negotiations to secure his voluntary surrender. The tear gas cases relied upon

by the Seventh Circuit involve the use of tear gas against unarmed individuals confined to jail cells, or against individuals who peacefully assembled for purposes of protest. Not a single case is cited which would have placed the officers on fair notice and warning that their conduct in deploying tear gas, or the amount of tear gas deployed in order to drive the armed and suicidal Escobedo out of his high rise apartment was clearly unlawful. Thus, the decision conflicts with this Court's current qualified immunity precedent.

Third, a writ of certiorari is warranted because the Seventh Circuit's Majority decision as to the use of flash bang devices once again misapplies and lowers the Estate's burden of proof on qualified immunity. The Majority Opinion cites no cases with facts similar to those presented here, constituting a tacit admission that the officers here lacked fair and clear warning that the use of flash bangs under the circumstances presented violated clearly established rights. The departure from traditional qualified immunity analysis warrants review by this Court.

A. The Seventh Circuit Applies A Constitutionally Impermissible Qualified Immunity Standard

The Seventh Circuit's denial of qualified immunity so departs from the standards traditionally employed by this Court as to warrant review. Under the articulated test, qualified immunity will be

routinely denied law enforcement officers for conduct which falls within the "hazy border between excessive force and acceptable force," conduct until now protected by qualified immunity. *Brosseau,* 543 U.S. at 201. Reasonable mistakes by law enforcement officers, often made in tense situations, also stand a strong chance of being unprotected by qualified immunity, which contravenes this Court's admonition in *Saucier v. Katz,* 533 U.S. 194, 205 (2001) that reasonable mistakes are entitled to the protection of qualified immunity.

The Seventh Circuit Opinion, references boilerplate qualified immunity standards, App. 13-18, but the Court fails to apply such standards to the issues here, instead utilizing a significantly lower standard to deny qualified immunity, akin to recklessness or even mere negligence. Numerous examples exist of the lesser standards applied by the Seventh Circuit, with the following being particularly telling:

> "The District Court **could reasonably question** whether the Defendant Officers had legitimate reasons to conclude that their use of tear gas and flash bang devices in this situation was acceptable." (App. 19) (Emphasis added).

> "The throwing of the flash bang device into a darkened room with no knowledge of the location of the individual inside that room could possibly create a violation." (App. 20) (Emphasis added).

> "**could be found to be unreasonable**." (App. 26) (Emphasis added).
>
> "The similarity of the facts on the *Marasco* case and of Escobedo's situation placed the Officers on notice that their entry **was possibly unconstitutional**." (App. 27) (Emphasis added)

Further indicative of resort to a significantly lower standard is the Majority Panel Opinion's repeated reliance upon dicta to demonstrate that the law was clearly established as to the limited uses of flash bang devices. Judge Posner of the Seventh Circuit defines dictum as "any statement made by a court for use in argument, illustration, analogy or suggestion. It is a remark, an aside, concerning some rule of law or legal proposition that is not necessarily essential to the decision and lacks the authority of adjudication." *United States v. Crawley,* 837 F.2d 291, 292 (7th Cir. 1988), quoting *Stover v. Stover,* 483 A.2d 783, 786 (Md.Ct.App. 1984). As a sister court comments, "Dicta is particularly unhelpful in qualified immunity cases where we seek to identify clearly established law." *Hamilton v. Cannon,* 80 F.3d 1525, 1530 (11th Cir. 1996).

Completing the indicators of a lesser, constitutionally impermissible standard is the use of general propositions rather than factually similar, closely analogous cases throughout the Opinion. To overcome qualified immunity, the Estate must offer either "a closely analogous case or evidence that the defendant's conduct is so patently violative of the

constitutional right that reasonable officials would know without guidance from a court." *Lawshe v. Simpson,* 16 F.3d 1475, 1483 (7th Cir. 1994). This Court emphasizes that identifying the clearly established right "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau,* 543 U.S. at 198. In *Brosseau,* this Court reversed an appellate court determination that "general tests" set forth in the Court's Fourth Amendment jurisprudence gave officials fair warning that their conduct was unlawful. *Id.* at 199. This Court made clear that the general tests were not enough to give fair warning, nor was it an "obvious case" where general standards clearly established the answer without developed case law. *Id.*

Had the Seventh Circuit applied the correct qualified immunity standards, all of the officers should have be granted qualified immunity because the Estate failed in its burden to demonstrate that each defendant violated clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). The Estate was required to show that a violation of Escobedo's rights had been found in factually similar cases, or that the violation was so clear that an official would realize he or she was violating an individual's constitutional rights even in the absence of an on-point case. *See Wernsing v. Thompson,* 423 F.3d 732, 742 (7th Cir. 2005), *cert. denied,* 547 U.S. 1004 (2006).

Qualified immunity provides "ample room for mistaken judgments," and therefore the plaintiff bears the burden of demonstrating that it should not apply. *Wheeler v. Lawson,* 539 F.3d 629, 639 (7th Cir. 2008), *reh'g en banc denied.* This is a "rather heavy burden," and "gives public officials the benefit of legal doubt." *Donovan v. Milwaukee,* 17 F.3d 944, 951 (7th Cir. 1994). "For qualified immunity to be surrendered, preexisting law must dictate, that is truly compel . . . the conclusion for every like-situated, reasonable government agent that what [he] is doing violates federal law in the circumstances." *Duda v. Board of Educ. of Franklin Park Public School Dist. No. 84,* 133 F.3d 1054, 1062 (7th Cir. 1998).

Qualified immunity should be awarded unless the individual defendant had "fair warning" that his conduct was violating the law as it existed at the time of the events giving rise to the lawsuit. *Hope,* 536 U.S. at 740. Justice Stevens in *Hope* compared on officer's right to fair notice as akin to the same right to fair notice a criminal defendant has when facing charges. Likewise, the Seventh Circuit itself in *Wernsing,* 423 F.3d at 739, framed the qualified immunity inquiry as being whether the questioned conduct was "clearly forbidden" by existing law.

The Seventh Circuit's application of a lesser constitutionally impermissible legal standard, if left unchanged, has serious ramifications for all law enforcement officers throughout the United States. Officers may be stripped of qualified immunity protection where plaintiffs simply show that jurors

"could reasonably question the conduct of the officers," or the conduct of the officers "could possibly create a violation," or their conduct "was possibly unconstitutional."

This Court has repeatedly held that qualified immunity must be afforded to police officers unless every reasonable police officer would know at the time he was violating the plaintiff's constitutional rights. As stated in *Malley,* 475 U.S. at 341, "if officers of reasonable competence could disagree on the issue, immunity should be recognized." This deferential standard is now in jeopardy. Qualified immunity should provide an "accommodation for reasonable error," and "'officials should not err always on the side of caution' because they fear being sued." *Hunter v. Bryant,* 502 U.S. 224, 229 (1991).

The Seventh Circuit's decision significantly increases the likelihood that law enforcement officer's decisions will now be subject to second-guessing by District Courts in evaluating entitlement to qualified immunity, or by jurors at trial. Qualified immunity will become the exception rather than the rule even where there are no cases to place officers on fair notice and warning that their conduct was constitutionally prohibited. As the Seventh Circuit's decision effectively eliminates application of qualified immunity in excessive force claims in all but the most clear-cut cases, immediate review by this Court is warranted.

B. The Seventh Circuit Applies Incorrect Legal Standards For Determining Whether The Law Is Clearly Established As To The Use Of Tear Gas

The Seventh Circuit cites no prior case law from this Court prohibiting the use of tear gas in the specific circumstances faced by the police officers in this case or, limiting the amount of tear gas which may be deployed in such circumstances. In so doing, the Seventh Circuit disregards the underlying purpose of deploying tear gas into Escobedo's apartment: to drive someone who is armed, high on cocaine, and in possession of a weapon, out of a barricaded apartment, after hours of unsuccessful negotiations for his voluntary surrender, thereby alleviating the need for a more drastic use of force. Reasonable police officers could conclude Escobedo was not the non-violent, non-threatening person the Court depicts.[3] Indeed, in his dissent Judge Manion emphasizes Escobedo was a potentially violent individual because he was high on cocaine, had a gun, and threatened to kill himself. (App. 39-40 n.2). Not a single case is cited which would have placed the officers on fair notice and warning that their conduct in deploying tear gas or the amount of tear gas deployed in order

[3] The facts remain that Escobedo had a loaded gun in his possession, had threatened to kill himself with it, was in possession of cocaine, which is a crime, and resisted arrest by not coming out of his apartment.

to drive the armed and suicidal Escobedo out of his high rise apartment was clearly unlawful.

The only Seventh Circuit authorities cited are *Stringer v. Rowe,* 616 F.2d 993 (7th Cir. 1980) and *Lock v. Jenkins,* 641 F.2d 488 (7th Cir. 1981), neither of which placed the officers on fair notice that the law forbids the use of tear gas under the circumstances presented to them. Both cases involved the use of tear gas against unarmed individuals confined to jail cells. Prison scenario cases are so factually dissimilar from the situation presented here that the Seventh Circuit's reliance upon *Stringer* and *Lock* disregards this Court's *Brosseau* admonition against the use of general propositions in evaluating whether the law was clearly established.

The Seventh Circuit acknowledged the lack of controlling precedent, but then turned to what it referred to as a "clear trend in the law from our sister circuits," which it determined clearly established that the use of tear gas as of July 19, 2005 was unreasonable under the circumstances presented. (App. 26).

However, notably absent from the Seventh Circuit decision are any cases from any circuits which would even begin to suggest a clear trend limiting the use of tear gas when officers are faced with an individual like Escobedo in these unique circumstances. The cases the Court resorts to, App. 25, are factually dissimilar because they involved either

use of tear gas by prison guards against non-threatening inmates in their cells or pepper spray against peaceful demonstrators or handcuffed individuals. Not a single "clear trend" case involved an individual in possession of a loaded weapon, high on cocaine who had barricaded himself in a high rise apartment and refused to surrender after hours of negotiation.

That Escobedo was unquestionably in possession of a loaded firearm distinguishes this case by definition from those relied upon by the Seventh Circuit. The only conceivable clear trend established is that tear gas may not be constitutionally permissible when officers are dealing with unarmed individuals. But those are not the facts of this case.

Estate of Smith v. Marasco, 318 F.3d 497 (3rd Cir. 2003), is the only other case upon which the Seventh Circuit Decision relies for its conclusion that the deployment of tear gas, and the amount deployed, was constitutionally impermissible. However, the *Marasco* Court did not hold that the police officers did anything to violate the Constitution. More importantly, qualified immunity was not even at issue in *Marasco*, as Judge Manion points out. (App. 41).

The *Marasco* Court did nothing more than conclude that based upon the evidence presented, the reasonableness of the officers' actions needed to be submitted to a jury. *Id.* at 517. Notably, nowhere did the Third Circuit Court of Appeals use any language

which would place officers on fair notice that the decision to use tear gas, or the amount of tear gas used, was clearly unlawful under the circumstances presented here

The Seventh Circuit seeks to equate the denial of summary judgment on an excessive force claim as somehow creating clearly established law that officers may not use tear gas in order to extricate a suicidal, barricaded individual, high on cocaine and in possession of a gun, from an apartment building after hours of negotiations to bring about a peaceful ending were unsuccessful. This is yet another example of the Court applying an incorrect legal standard. No cases are cited for such a novel proposition. To lose qualified immunity protection, the relied upon cases must plainly hold that the particular conduct was unconstitutional. Affirming the denial of a motion for summary judgment can never satisfy this requirement.

Similarly, not a single case is discussed which addresses the amount of tear gas which may be used under these circumstances, much less the amount which may be considered constitutionally excessive. Although the Seventh Circuit opinion often refers to an incapacitating concentration of tear gas, the facts suggest that the amount used was not clearly excessive as the underlying purposes of using tear gas were not achieved here. Escobedo was not forced from his apartment, which was the objective in deploying tear gas. He was not incapacitated because he remained capable of repeatedly yelling that he had

a gun once the officers entered his apartment, and then pointed his gun directly at the officers, precipitating the lethal shooting.

The officers are entitled to the protection of qualified immunity as to the use of tear gas, and the amount of tear gas used, because the law was not clearly established on July 15, 2005, on either count under the peculiar circumstances presented here. The Seventh Circuit applies an incorrect standard with broad-reaching implications for police officers throughout the country. Certiorari should be granted to correct this error and provide the officers with the qualified immunity to which they are entitled.

C. The Seventh Circuit Majority Opinion Applies Incorrect Legal Standards For Determining Whether The Law Is Clearly Established As To The Use Of Flash Bang Devices

To reach the conclusion that the use of flash bang devices was an excessive use of force as of July 19, 2005, the Seventh Circuit Majority Decision admittedly relies upon dicta from several of its own prior decisions, a process which once again misapplies and lessens the Estate's burden of proof on qualified immunity. In his dissent, Judge Manion observes that the three evidence suppression cases cited by the Majority Opinion, *United States v. Jones*, 214 F.3d 836 (7th Cir. 2000), *United States v. Folks*, 236 F.3d 384 (7th Cir.), *cert. denied*, 534 U.S. 830 (2001) and

United States v. Morris, 349 F.3d 1009 (7th Cir. 2003), did not clearly establish the existence of any constitutional rights because "in none of them did we conclude that the use of flash-bang devices constituted excessive force." (App. 38).

Indeed, in *Molina v. Cooper*, 325 F.3d 963 (7th Cir. 2003), which the Majority Opinion substantially discounts as being limited to its facts, this Court expressly wrote "We have voiced reservations about the use of these devices [flash bangs] in recent cases, although **we have not gone so far as to find their use unconstitutional**." 325 F.3d at 973 n.8 (Emphasis added).

Molina should not be cast aside, as it is, in Judge Manion's words "the most relevant case for the issue confronting us because it is from this circuit, it is an excessive force case involving flash-bang devices, and the discussion of the propriety of using such devices was not dicta." (App. 36). Although there are factual distinctions between *Molina* and this case, the similarities between the two cases are unmistakable. Molina was known to keep weapons in his home. The officers here unquestionably knew that Escobedo had a loaded weapon in his possession. Thus, as Judge Manion observes, "*Molina's* relevance to the qualified immunity analysis here is significant and should be recognized as the leading authority in this circuit." (App. 37).

Certiorari is appropriate here because the Seventh Circuit's reliance upon dicta to satisfy the

clearly established law standard conflicts with Supreme Court precedent which requires that only "holdings" of the court may establish clearly established law. Recalling this Court's admonition in *Hope*, the level of clarity in the law to satisfy the clearly established standard is that necessary to convict someone of the crime. *Hope*, 536 U.S. at 739-40.

A fair warning standard is not a lenient standard. Permitting courts to utilize dicta to satisfy the fair warning standard turns the traditional qualified immunity analysis on its head. Relying upon dicta permits an injured party to make an end run around the obligation to define the constitutional right with the appropriate level of specificity, rather than relying upon general constitutional rules.

The Seventh Circuit Majority Decision cites no case with facts similar to those presented here. This is a tacit admission that there are no cases with the very high degree of prior factual particularity so as to show that the law was clearly established when the officers entered Escobedo's apartment and bedroom on July 19, 2005. The bright line of clearly established law is "staked out by a process of inclusion and exclusion in individual concrete cases." *Donovan*, 17 F.3d at 953. Absent clearly established law, "an officer could not reasonably be expected to anticipate subsequent legal developments nor could he or she fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818.

In addition to its reliance upon dicta from the three evidence suppression cases from this Circuit, the Seventh Circuit's Majority decision once again turns to *Marasco*. However, that case does not clearly establish anything, as the *Marasco* Court simply determined that a jury question existed on whether the disputed facts constituted an excessive use of force. As Judge Manion notes, *Marasco* "provides little (if any) guidance here: holding that a particular deployment of flash-bang devices could (or could not) be an excessive use of force does not clearly establish anything."[4] (App. 41)

Dicta and *Marasco* properly discarded, the Seventh Circuit Majority decision is left with *Boyd v. Benton County*, 374 F.3d 773 (9th Cir. 2004). *Boyd*, however, does not provide the requisite fair warning to the officers here because it involved a factual scenario not present here; the indiscriminate tossing of flash bang devices into a room the officers ***knew*** would be occupied by innocent unarmed persons who were asleep. Given the factual disparity between the facts here and those in *Boyd*, *Boyd* cannot clearly establish that flash bang devices cannot be deployed when officers are dealing with an armed and suicidal individual, high on cocaine, who would not voluntarily leave his apartment after four hours of

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[4] The same analysis applies equally with respect to the tear gas issue.

intense negotiations, and could not be driven out by the lesser force used, tear gas.

Molina is controlling precedent and provides a sound basis for the use of flash bang devices in this case. *Molina* holds that it is not unreasonable for officers to use flash bang devices when they believe the only occupant of a dwelling is armed, and the officers have ample reason to be concerned about their personal safety. The Seventh Circuit Majority Decision rejects *Molina* on the grounds that Escobedo was neither violent, dangerous, nor did he pose an immediate threat to the officers. That may be the opinion of the Majority, but the issue for qualified immunity is whether every reasonable police officer would agree.

It is undisputed that Escobedo was high on cocaine, had a gun, and threatened to kill himself. It is inconceivable to think that officers possessed of such information should assume that the person poses no threat of violence or threat to their personal safety. Knowing Escobedo was high on drugs, was in possession of a gun, and had refused to come out of his apartment after hours of negotiations, the officers were presented with a dangerous entry point both at the front door and at the heavily barricaded door of Escobedo's bedroom. As Judge Manion writes, under the circumstances "The flash-bang devices may have been their safest option." (App. 44). The proof being in the pudding . . . Escobedo subsequently pointed a loaded weapon directly at the officers and was shot in self defense. Escobedo's conduct confirms the

reasonable assumptions of the police when they entered his apartment.

The Seventh Circuit Majority Decision, if allowed to stand, substantially reduces the plaintiffs' burden to demonstrate that the law was clearly established by coming forward with closely analogous cases which would provide officers with fair warning that their conduct exceeds constitutional bounds and is forbidden. The only case involving a factually analogous situation is *Molina*, which actually supports the grant of qualified immunity here. Judge Manion's strong dissent provides a more than adequate basis for granting certiorari. The cases relied upon failed to provide fair and clear warning that the officers' conduct violated clearly established rights.

CONCLUSION

The Seventh Circuit creates a new qualified immunity standard, a standard significantly lower than the firmly established fair warning standard espoused by this Court. As a result, the law enforcement officers here, and all others who may need to resort to force to protect themselves and the public, will be left to guess as to whether Courts will later determine their conduct was unconstitutional, even where no Court has ever before held such conduct to be illegal. Law enforcement officers may lose qualified immunity protection for reasonable mistakes, which contradicts this Court's precedent.

The interests of the law enforcement community nationwide lie in favor of this Court granting certiorari to review the new standard.

In addition, the law as of July 19, 2005, did not give the officers fair and clear warning that their conduct in using tear gas and flash bang devices was unconstitutional under the circumstances presented to them. There has been no decision from this Court, or from any Circuit Court, that addresses the use of tear gas and flash bang devices under any circumstances similar to those presented here. Given the significance of these two non-lethal tools within the law enforcement community, certiorari should be granted so that officers may know the bounds of their use of both of these tactics. The petitioners respectfully request that the decision of the Seventh Circuit denying qualified immunity be summarily reversed and that their petition for writ of certiorari be granted.

Respectfully submitted,

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600 F.3d 770

United States Court of Appeals,
Seventh Circuit.

ESTATE OF Rudy ESCOBEDO, (Deceased)
(Raquel Hanic, Personal Representative of Estate),
Plaintiff-Appellee,

v.

Martin BENDER, et al., Defendants-Appellants.

No. 08-2365.

Argued Jan. 22, 2009.
Decided April 5, 2010.

Gary D. Lebrato, Fort Wayne, IN, Michael K. Sutherlin, Attorney, Sutherlin & Associates, Indianapolis, IN, for Plaintiff-Appellee.

Robert T. Keen, Jr., Attorney, Carson Boxberger LLP, Fort Wayne, IN, for Defendants-Appellants.

Before MANION and KANNE, Circuit Judges, and KENDALL, District Judge.*

KENDALL, District Judge.

Raquel Hanic, the personal representative of the estate of Rudy Escobedo ("the Estate"), filed suit pursuant to 42 U.S.C. § 1983 and Indiana state law against the City of Fort Wayne and against individual members of the Fort Wayne Police Department.

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* Hon. Virginia M. Kendall, District Judge for the Northern District of Illinois, is sitting by designation.

Hanic asserted that the individual officers used excessive force against Escobedo when they deployed tear gas into his apartment in an attempt to extricate him from the unit where he had isolated himself threatening to commit suicide. After refusing to come out, the officers used additional tear gas and flash bang grenades to enter the apartment, setting fire to the exterior room before throwing the flash bang grenades into the darkened bedroom inches from Escobedo's head rendering him blind and deaf before shooting him to death. The Defendant Officers filed a motion for summary judgment asserting, among other things, that they were entitled to qualified immunity for their actions. The district court denied the motion, in part, finding that the officers were not entitled to qualified immunity for the entry with the tear gas and flash bang devices. The officers then filed this interlocutory appeal. For the following reasons, we affirm.

I. Background

We begin by setting forth the facts as the district court found them, that is, in the light most favorable to the Estate. *See Johnson v. Jones,* 515 U.S. 304, 319-20, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995); *see also Jewett v. Anders,* 521 F.3d 818, 822 (7th Cir.2008) (Appellate court's review of a denial of qualified immunity is framed either by the facts as assumed by the district court or by the facts as set forth by the plaintiff). On July 19, 2005, at 4:24 a.m., Rudy Escobedo ("Escobedo") dialed 911. He told the

dispatcher that he was armed with a gun and wanted to shoot himself. He also told the dispatcher that he was high on cocaine. During the 911 call, Escobedo asked the dispatcher to contact his psychologist and he provided the dispatcher with the psychologist's phone number. Throughout the conversation, Escobedo expressed that he was seeking help and that he desperately needed to talk to someone. Escobedo stated that while he was contemplating killing himself, he had no intention of harming anyone else including the police. Escobedo never made any explicit threats to the police or other persons during the call stating instead, "I'm not going to hurt anybody"; and "I just want help." In summarizing the overall tone of the 911 call, the district court made the factual determination that Escobedo was in despair about his drug addiction and his life in general and was suicidal.

Sergeant C.M. Taylor ("Taylor") (not a defendant in the present lawsuit) was the first officer to speak with Escobedo after the 911 call via his personal cell phone. Taylor called Escobedo at 4:55 a.m. and Escobedo informed him that he was armed and planned to commit suicide. After approximately twenty-five minutes, Taylor decided to contact the Crisis Response Team ("CRT") and the Emergency Response Team ("ERT") to respond to the situation.

Once the CRT and ERT arrived, Taylor transferred the phone call with Escobedo to Bernard Ebetino ("Ebetino"), a negotiator for CRT. Ebetino took over negotiations with Escobedo at 5:42 a.m.

Escobedo repeated that he was suicidal and armed, asked again to speak with his psychologist and said that he wanted help and medicine for his drug addiction. At 6:23 a.m., the CRT began using a "direct link phone system," a device that allowed several other officers on the seventh floor to listen to the conversation between Escobedo and Ebetino; however, the CRT did not follow protocol for handling the systematic overview of negotiations in that the CRT commander relied on information from officers near the mobile direct link phone system. Normal procedures called for the CRT commander to listen to the negotiations via the direct link system. As a result, the CRT commander did not always learn about important information and accordingly could not inform the scene commander and the ERT commander about such information. For instance, as the district court pointed out, the CRT commander did not recall hearing or learning that Escobedo had removed objects from his apartment door, something that would have been considered a sign of progress.

When this switch was made, Ebetino stopped using Taylor's cell phone and began using another officer's personal cell phone. Taylor's cell phone was not used again during the incident. There is no evidence in the record that Escobedo was told of the change of phones or given the new phone number in case the call was terminated. In fact, after the initial round of tear gas was fired into Escobedo's apartment, the record indicates that Escobedo attempted to call Taylor's cell phone multiple times with no

success. Escobedo's comments to Ebetino continued to include threats of suicide and a fear of being killed by the police. At times, the conversation took a positive turn and Ebetino believed Escobedo was close to surrendering. But Escobedo would always return to comments about suicide, fear of being killed by the police and his addiction. At one point, Ebetino told Escobedo that the police were trying to contact his psychologist and bring him to the scene so Escobedo could talk to him when he left his apartment. Eventually, Sergeant Kevin Hunter ("Hunter"), head of the CRT, spoke with Escobedo's psychologist but never invited him to the scene or asked him to assist. Hunter recalls that the psychologist told him that he did not think that Escobedo had a history of using weapons or attempting suicide.

Ebetino testified that during the negotiations, Escobedo did not make or constitute a threat to the police or to the public, except "the only indication . . . was when he said he wanted to come out of his apartment with the gun." This statement occurred at 8:28 a.m., which was after supervisors decided, at about 8 a.m. to fire tear gas into Escobedo's apartment and then make entry. At some moments, Ebetino believed Escobedo was barricading his door and at other moments it sounded as if Escobedo was removing the barricade by the door. At 7:27 a.m. he thought that Escobedo was removing the barricade from the door and he assumed (wrongfully) that this information was communicated to the commanders.

During the course of negotiations, Hunter, Lieutenant Kevin Zelt ("Zelt") (head of ERT), and Deputy Chief Martin Bender ("Bender") (commander of the scene) discussed using tear gas against Escobedo. Bender had overall authority over the incident and scene, but relied on Zelt to choose the tactics against Escobedo and on Hunter for information regarding the negotiations. Hunter had to rely on information from other CRT members to supply to Bender. As mentioned previously, normal procedures call for Hunter to listen to negotiations via the direct link system, but he did not do so. At some point between 6:45 and 8 a.m. the idea of using tear gas was first broached. Bender later testified that the key factor in his decision to use tear gas on Escobedo was that by 8 a.m., "it was our belief that the negotiations were not going anywhere," pedestrian and vehicle traffic was increasing in the area, and Hunter had told him that Ebetino heard noises suggesting that Escobedo was barricading his apartment. Although Bender was not told that Escobedo had expressed that he was not going to hurt the police or anyone else, Bender believed that Escobedo was a threat to the public because of "the mere fact that he was armed with a weapon and threatening to commit suicide."

Zelt first suggested using tear gas against Escobedo as a "standard procedure" and "the next logical step" when communications or negotiations with a person are not succeeding and Escobedo was barricading and fortifying his position. Although Zelt

stated that he believed Escobedo had made threats of some kind, the district court found that it was not clear that Zelt believed this at the time of the incident or formed that opinion afterwards. Regardless, Zelt could not identify any statement Escobedo made that Zelt knew of at the time of the stand-off that constituted an explicit threat to the police or public. Bender also acknowledged that Escobedo had not committed any crime by the point in time that the tear gas was deployed. Zelt stated that the purpose of forcing Escobedo from his apartment with tear gas was not to arrest him but to take him into custody for a 24-hour emergency mental health detention. Zelt indicated that the decision to introduce tear gas was also motivated by his concern that his officers' readiness was deteriorating because it was hot outside. He chose 8:30 a.m. as the deadline for negotiations because he thought it was important to introduce the tear gas before the peak downtown hour although he was aware that most people working downtown were already at work by 8:30 a.m. Hunter concurred with Zelt's decision to use tear gas, focusing on the potential danger to the increasing number of persons who would be in the downtown area and near the hospital that was across the street from Escobedo's apartment building. Deputy Chief Douglas Lucker ("Lucker") was also on the scene at various points and participated in discussions with Bender, Zelt, and Hunter on the use of tear gas to force Escobedo from his apartment.

The district court also considered the testimony of Larry Danaher ("Danaher"), the Estate's expert in police practices. Danaher stated that based on his case review, Escobedo did not pose a threat to officers or the public that required the use of force and that the use of force was premature and based on flawed priorities. Danaher also said that he is familiar with enough traffic in Fort Wayne to know it could have been rerouted with minimal inconvenience, and that traffic concerns should not have played a role in the decision to use force.

After learning that the police would deploy tear gas against Escobedo, Ebetino continued to negotiate. The police did not inform Escobedo of the plan to deploy gas against him. At 8:28 a.m., Escobedo told Ebetino he was going to come out of the apartment but was going to bring the gun with him. At 8:30 a.m., Escobedo again conveyed that he would come out of his apartment in three minutes. Ebetino conveyed to fellow members of the CRT that he wanted another three minutes to negotiate with Escobedo. Ebetino did not ask for more time beyond that three minute reprieve, and he did not ask other members of the CRT to inform the commanders that Escobedo would surrender if Ebetino were given more time to negotiate. After those three minutes elapsed, Ebetino believed that Escobedo was not going to come out.

As the police prepared to fire tear gas grenades into the apartment, Ebetino was told by one of the commanders at the scene to wind down the conversation with Escobedo. Hunter testified that Ebetino

ended his phone call with Escobedo before the gas was deployed and that this was not in accordance with normal procedures. As the deadline approached, the ERT officers put on their gas masks. Sergeant Tim Selvia ("Selvia"), who led the ERT entry team, stated that wearing the gas mask makes it difficult to communicate because it muffles one's voice. Danaher stated that gas masks distort officers' voices and make commands sound distorted and sometimes indecipherable.

Zelt calculated what he thought would be an "incapacitating concentration" of chemicals for Escobedo's apartment. He chose six .37 millimeter liquid rounds, six .37 millimeter Sage powder, and five or ten .12 gauge munitions. At 8:33 a.m., Officer Brian Martin ("Martin") and two other officers fired the tear gas rounds into the windows of Escobedo's apartment. After the first round of tear gas was fired, police waited about ten minutes before Zelt ordered officers to fire the second round of chemical agents into Escobedo's apartment. According to Ebetino, after the first round of tear gas had been fired, the fumes became too strong for him to continue negotiating with Escobedo, forcing him and other CRT members to leave the seventh floor of Escobedo's apartment building without their communication equipment. This cut off all communication with Escobedo. Zelt stated that it is not standard for a negotiator to leave the scene after chemical agents or gas are used against a subject, but it occurred here because Ebetino's point of negotiation was unusually

close to Escobedo's apartment, and Ebetino did not have a gas mask. While the tear gas rounds were being fired into Escobedo's apartment, Escobedo tried to call Officer Taylor's cell phone, the phone that was originally used to communicate with him. Escobedo attempted to contact the police five times: at 8:34 a.m., 8:36 a.m., 8:39 a.m., 8:43 a.m., and 8:45 a.m. After all of the chemical rounds had been fired, there was twelve times the incapacitating concentration of tear gas in Escobedo's apartment. Danaher said that amount "was clearly and obviously excessive."

After the second round of tear gas was fired into Escobedo's apartment, police waited another ten minutes and then decided to breach the apartment door and deploy "clear out" canisters containing more tear gas. The ERT entry team included Officers Selvia, Martin, Jason Brown ("Brown"), and Scott Straub ("Straub"). All of the officers, except for Brown, were armed with MP5 submachine guns, a Glock handgun, or both. Brown was carrying a shoulder-fired weapon that shoots beanbag rounds meant to stun or disable a person. After using a ram to open the door, the officers threw a "clear out" canister of tear gas, waited a few minutes and then, after receiving no response, threw a second canister of tear gas. After still receiving no response, the ERT team prepared to enter the apartment. Upon entering Escobedo's apartment the ERT team threw a flash bang grenade. When the flash bang grenade explodes, it yields an intense light and extremely loud sound. The explosion from the flash bang grenade ignited the

propellant of a tear gas canister and started a fire in Escobedo's apartment. The ERT team extinguished the fire once inside the apartment. After realizing that no one was in the main room or the kitchen, the ERT team determined Escobedo was in the bedroom. They yelled for him to surrender but received no response. At this point, the officers took a ram and began to force the bedroom door open. As the officers worked to push the door open, they heard Escobedo yell several times that he had a gun and that it was pointed at his own head. Once the officers were able to get the door slightly open, they threw a flash bang grenade into the bedroom. The room was "pitch black" when the flash bang was thrown into the room. The flash bang grenade exploded in the front of, or just inside, the bedroom closet where Escobedo was located. The door eventually broke, and all of the officers entered the bedroom. Escobedo continued to yell that he had a gun and that it was pointed at his own head. The officers eventually located Escobedo, who was sitting on the floor of the closet with a gun pointed upside down at his own head. Martin ordered Escobedo to drop the gun and when Escobedo began to lower the gun, Martin fired because he was in fear of his own life. When Brown heard Martin order Escobedo to drop his gun, he too began to fire his weapon at Escobedo in an attempt to disarm him. Escobedo was declared dead at the scene a short time later.

Danaher, the Estate's expert, stated that the Officers disregarded the danger of flash bang

grenades when they threw one into the bedroom and it exploded a few feet from Escobedo's head, certainly rendering him both blind and deaf at the time he was shot.

On December 20, 2005, Raquel Hanic, as Personal Representative of the Estate of Rudy Escobedo ("the Estate") filed a complaint under 42 U.S.C. § 1983 alleging, among other things, that Deputy Chief Martin Bender, Deputy Chief Douglas Lucker, Sergeant Kevin Hunter, Lieutenant Kevin Zelt, Officer Brian Martin, Officer Jason Brown, Officer Scott Straub, Sergeant Tim Selvia, Officer Derrick Westfield, Sergeant Shane Lee and Officer Bernard Ebetino violated Escobedo's constitutional rights by using excessive force against him when they deployed tear gas and flash bang grenades during the July 19, 2005 standoff. On January 22, 2007, Defendants Lee and Westfield were dismissed from the case. The remaining Defendants moved for summary judgment, arguing in part that they were entitled to qualified immunity. The district court granted in part and denied in part the Defendant Officers' motion for summary judgment. Specifically, the district court dismissed Defendant Ebetino from the case, and granted summary judgment for the Defendants on the Estate's excessive force claim against Martin and Brown for the fatal shooting of Escobedo, the Estate's failure to train claim, the Estate's warrantless entry claim, the Estate's substantive due process claim and the Estate's state law wrongful death claim. The district court denied the

Defendants' summary judgment with respect to the Estate's excessive force claim against Martin for firing tear gas into Escobedo's apartment; the Estate's supervisory liability claim against Bender, Lucker, Zelt, and Hunter, for the tear gas fired into Escobedo's apartment; the Estate's excessive force claim against the entry team – Selvia, Martin, Brown, and Straub – for the raid on Escobedo's apartment and bedroom with tear gas and flash bang grenades; and the supervisory liability claim against Bender, Lucker, Zelt, and Hunter, for the entry team's raid on Escobedo's apartment. In denying the summary judgment on these claims, the district court found that the Defendant Officers were not entitled to qualified immunity. The individual officers, Bender, Lucker, Zelt, Hunter, Martin, Selvia, Brown and Straub, now appeal the district court's denial of qualified immunity.

II. Discussion

A. Qualified Immunity

The only question before us on this appeal is whether, taking the facts as the district court presented them, the district court erred in finding that the individual officers were not entitled to qualified immunity for their decision to use tear gas to extricate Escobedo from his apartment and their decision to use more tear gas and flash bang grenades

to enter his apartment.[2] We review the district court's denial of summary judgment on qualified immunity grounds *de novo,* asking whether viewing the facts in the light most favorable to the plaintiff, the defendants were nonetheless entitled to qualified immunity as a matter of law. *See Anders,* 521 F.3d at 821 (citing *Sullivan v. Ramirez,* 360 F.3d 692, 696 (7th Cir.2004)). While a district court's denial of summary of judgment is not ordinarily appealable, when a district court denies summary judgment on qualified immunity grounds, we have jurisdiction to consider this purely legal question. *See Leaf v. Shelnutt,* 400 F.3d 1070, 1078 (7th Cir.2005).

We start with the understanding that governmental actors performing discretionary functions enjoy qualified immunity and are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person

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[2] The Estate filed a motion for interlocutory certification pursuant to 28 U.S.C. § 1292(b) concerning issues decided in the district court's partial grant of Defendants' Motion for Summary Judgment which was granted by the district court on September 25, 2008. On October 6, 2008, the Estate petitioned this Court for an interlocutory appeal. *See Estate of Escobedo v. Bender, et al.,* Appeal No. 08-8030. On October 23, 2008, this Court denied the Estate's petition for interlocutory appeal. On October 29, 2008, the Estate filed a Motion for Rehearing and Rehearing *En banc.* On November 14, 2008, this Court issued an order instructing the Clerk to distribute the petition *en banc.* On April 21, 2009, this Court denied the Estate's Petition for Rehearing and its Petition for Rehearing *En banc.*

would have known." *Sallenger v. Oakes,* 473 F.3d 731, 739 (7th Cir.2007) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). Up until the day before this case was argued, *Saucier v. Katz* maintained a sequential procedure for considering whether an officer is entitled to qualified immunity. 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). Under *Saucier*, we were required to first determine whether, taking the facts in the light most favorable to the plaintiff, the officers' conduct violated a constitutional right. *Id.* Only if the plaintiff met that burden would we then determine whether the particular constitutional right was "clearly established" at the time of the alleged violation. *Id.* The Supreme Court recently reconsidered *Saucier* and decided "that while the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory." *Pearson v. Callahan,* ___ U.S. ___, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). Although it recognized situations in which the *Saucier* approach is beneficial, the Court concluded that the judges of the district courts and the courts of appeals could exercise their discretion in deciding which of the two prongs to address first. *Id.*

Here, the Defendants limit their argument on appeal to the second prong of the *Saucier* qualified immunity analysis, that is: whether the law was clearly established as of July 19, 2005, that the use of tear gas and flash bang devices in these unique circumstances violates an individual's Fourth Amendment right to be free from the use of excessive force.

See Appellants' Br. at 19 n. 3 ("Although appellants remain convinced of the propriety of their actions, they acknowledge that the issue for review by this Court on interlocutory appeal is the second prong of the *Saucier* test, whether the law was clearly established at the time of the alleged constitutional violation."). They do not contest the district court's finding that taking the facts in the light most favorable to the Estate, a reasonable jury could find that their decision to use tear gas and flash bang devices against Escobedo, a suicidal, armed, barricaded person, was an excessive use of force under the Fourth Amendment. Accordingly, for purpose of the present appeal, we turn to the second prong of the *Saucier* qualified immunity analysis and assume that a reasonable jury could conclude that the Defendants' conduct violated Escobedo's Fourth Amendment rights.[3]

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[3] Defendants do make a passing reference in their opening brief to the "objective reasonableness standard," while discussing their decision to enter Escobedo's apartment with the use of tear gas and flash bang devices. *See* Appellants' Br. at 18 ("The objective reasonableness standard does not require that officers use alternative less intrusive means to accomplish their objectives."). The objective reasonableness standard is the constitutional test for use of force considerations. *See Graham v. Connor,* 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) (holding objective reasonableness standard applicable to Fourth Amendment use of force claims). To the extent that Defendants' language attempts to address the first prong of the Saucier qualified immunity analysis, it is in conflict with Defendants' direct statement that it is seeking review only as to the second prong of the Saucier test. Furthermore, if it was Defendants'

(Continued on following page)

i. Clearly Established

The Defendants claim that they are entitled to qualified immunity because the law was not clearly established on July 19, 2005, to place them on notice that the use of tear gas and flash bang devices in these particular circumstances was unconstitutional. The Estate has the burden of establishing that the constitutional right at issue was clearly established. *See Boyd v. Owen,* 481 F.3d 520, 526 (7th Cir.2007); *see also Koger v. Bryan,* 523 F.3d 789, 802 (7th Cir.2008) (A plaintiff seeking to defeat an assertion of qualified immunity must establish "that the law concerning the plaintiff's asserted right was clearly established at the time the challenged conduct occurred.") (internal quotations omitted). For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right"; however, an official action is not protected by qualified immunity only when the very action in question has previously been held unlawful, rather the unlawfulness must be apparent "in light of the pre-existing law." *Hope v. Pelzer,* 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002).

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intention to make a substantive argument with passing reference to the objective reasonableness standard, the argument is waived for want of development. *See Estate of Moreland v. Dieter,* 395 F.3d 747, 759 (7th Cir.2005) ("perfunctory or undeveloped arguments are waived.").

The Estate can demonstrate that the right was clearly established by presenting a closely analogous case that establishes that the Defendants' conduct was unconstitutional or by presenting evidence that the Defendant's conduct was so patently violative of the constitutional right that reasonable officials would know without guidance from a court. *See Hope,* 536 U.S. at 739-40, 122 S.Ct. 2508; *see also Siebert v. Severino,* 256 F.3d 648, 654-55 (7th Cir.2001) (identifying two routes for proving that a right is clearly established: (1) the violation is so obvious that a reasonable officer would know that what he is doing violates the Constitution; or (2) a closely analogous case establishes that the conduct is unconstitutional).

a. Patently Obvious Constitutional Violation

When assessing whether a constitutional violation has occurred, "[t]he Fourth Amendment inquiry is one of 'objective reasonableness' under the circumstances." *See Graham v. Connor,* 490 U.S. 386, 399, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). To determine whether the force used to effect a particular seizure is reasonable, we balance the nature and quality of the intrusion on the individual's rights against the "countervailing governmental interests at stake." *See id.* at 395, 109 S.Ct. 1865. Factors to consider in making a determination of whether the amount of force used to effectuate a seizure is reasonable include the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the

officers or others, and whether he actively is resisting arrest or attempting to evade arrest by flight. *See id.* at 397, 109 S.Ct. 1865. Other factors include whether the individual was under arrest or suspected of committing a crime, was armed, or was interfering or attempting to interfere with the officer's execution of his or her duties. *See McDonald v. Haskins*, 966 F.2d 292, 292-93 (7th Cir.1992). In the end, the excessive force inquiry "looks to whether the force used to seize the suspect was excessive in relation to the danger he posed – to the community or to the arresting officers – if left unattended." *Id.* at 294; *see also Estate of Starks v. Enyart*, 5 F.3d 230, 234 (7th Cir.1993) (finding that the amount of force that is constitutionally permitted to execute a seizure decreases with the threat of danger posed by the individual being seized).

Applying the *Graham* factors, and drawing all inferences in favor of the Estate, the district court could reasonably question whether the Defendant Officers had legitimate reasons to conclude that their use of tear gas and flash bang devices in this situation was acceptable. At the time the officers deployed the first round of tear gas into Escobedo's apartment and continuing on through their decision to deploy a second round of tear gas and then to use more tear gas and flash bang devices to enter to Escobedo's apartment, Escobedo was not posing an immediate threat to the officers or to the public, the standoff was only three hours old, and the officers making the tactical decisions did not have all of the

relevant and critical information regarding the negotiations. Escobedo was not resisting arrest, fleeing from the police or holding hostages. While Escobedo may have posed some level of theat or potential threat to the Defendant Officers because he was armed and under the influence of drugs, taking the facts in the light most favorable to the Estate, he did not threaten to harm anyone but himself. Escobedo had not committed a crime, there were no efforts to arrest him for the commission of a crime, and there were no warrants for his arrest. The officers' own reason for the deployment of the force used was to seize Escobedo for a twenty-four-hour mental health watch. The unreasonableness of the decision is further exacerbated by the breakdown in communication initiated by Defendants, the lack of violent history by Escobedo (confirmed by his counselor), and the lack of any hostages or threats to the public. This scenario coupled with the amount of tear gas utilized by the Defendants, twelve times the incapacitating level of tear gas necessary, the use of flash bang devices within the tear-gas-filled room, and the throwing of the flash bang device into a darkened room with no knowledge of the location of the individual inside that room could possibly create a violation that is so patent that no violator has even attempted to obtain an appellate ruling on it. *See Anderson v. Romero*, 72 F.3d 518, 526-27 (7th Cir.1995) ("A constitutional violation that is so patent that no violator has even attempted to obtain an appellate ruling on it can be regarded as clearly established even in the absence of precedent.").

The court need not identify this as such a case, however, because on July 19, 2005, Defendants were properly on notice that the use of tear gas and flash bang devices in a closely analogous context was deemed unreasonable.

b. Closely Analogous Case Law

When looking at closely analogous cases to determine if a right was clearly established at the time of the violation, we look first to controlling precedent on the issue from the Supreme Court and to precedent from this Circuit. In the absence of controlling precedent, we must broaden our survey to include all relevant case law in order to determine "whether there was such a clear trend in the case law that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time." *Jacobs v. City of Chicago,* 215 F.3d 758, 766 (7th Cir.2000).

Finding that a right is clearly established under the second prong of *Saucier*'s qualified immunity analysis is not "predicated upon the existence of a prior case that is directly on point." *Green v. Butler,* 420 F.3d 689, 701 (7th Cir.2005) (internal citations omitted). "Although earlier cases involving fundamentally similar facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding." *Hope,* 536 U.S. at 741, 122 S.Ct. 2508. Rather, even where there are notable factual distinctions between

the precedents relied on and the case before the Court, if the prior decisions gave reasonable warning that the conduct at issue violated constitutional rights they can demonstrate clearly established law. *See id.* While Fourth Amendment inquiries are fact intensive, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* Accordingly, the salient question here is not whether there is a prior case identical to the Estate's current claim but whether the state of the law at the relevant time gave the Defendants fair warning that their treatment of Escobedo was unconstitutional. *Green*, 420 F.3d at 701.

1. Tear Gas

This Circuit has previously analyzed under what circumstances the use of tear gas and other disabling chemical agents would be constitutionally impermissible. In *Stringer v. Rowe*, 616 F.2d 993 (7th Cir.1980) and *Lock v. Jenkins*, 641 F.2d 488 (7th Cir.1981), we discussed the constitutional limits for the use of tear gas and mace on pre-trial detainee in confined areas. We determined that the use of tear gas against persons confined in a jail cell was appropriate only in rare circumstances and was not justified when a pre-trial detainees did not constitute *an actual threat. See Lock,* 641 F.2d at 496 (although a tray could be considered a potential weapon, it was not enough to justify use of tear gas; shouting threats to guards was not enough to justify the use of tear gas; engaging in a riot after attempting to escape and taking the

prison warden and others hostage was enough to justify use of tear gas). In so holding, we looked to several other circuits that had previously ruled that "the use of such agents should be strictly limited to circumstances presenting the utmost degree of danger and loss of control," and that the "use of potentially dangerous quantities of the substance is justified only under narrowly defined circumstances." *Stringer*, 616 F.2d at 999 (citing *Spain v. Procunier*, 600 F.2d 189, 196 (9th Cir.1979) and *McCargo v. Mister*, 462 F.Supp. 813, 819 (D.Md.1978)). Additionally, we specifically stated that the use of tear gas "to subdue individual prisoners, rather than to quell large disturbances, should be more restricted." *Id.*

Other circuits have also addressed the constitutional limits of using tear gas on non-prisoners. *See Jacobs*, 215 F.3d at 766. In *Estate of Smith v. Marasco*, 318 F.3d 497 (3d Cir.2003),[4] the police received a complaint which caused them to go to the Smith's house. *Id.* at 502. Smith was a former Vietnam veteran and suffered from various mental

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[4] Defendants argue that *Marasco* was decided in November 2005, which is after the date of the incident in this case and therefore *Marasco* could not have placed the Defendants on notice that their conduct was unlawful; however, the Third Circuit has two opinions concerning *Marasco*. *Compare Estate of Smith v. Marasco*, 318 F.3d 497 (3d Cir.2003) (*Marasco I*), *with Estate of Smith v. Marasco*, 430 F.3d 140 (3d Cir.2005) (*Marasco II*). *Marasco I* is discussed in this Opinion and was decided prior to July 2005.

health problems including Post-Traumatic Stress Disorder. *Id.* at 501-02. After arriving at Smith's home and receiving no response from knocking on the door, the officers saw a red light and believed that it was a laser-sighted firearm that Smith was pointing at them. *Id.* After attempting to communicate with Smith, the officers called for an ERT team. *Id.* The ERT team arrived with thirty officers and numerous weapons. *Id.* at 503. During the course of negotiations with Smith, the ERT team refused to let friends or family communicate with Smith and rejected the use of a psychologist. *Id.* The ERT team then decided to clear Smith out of his house, and to enter his house themselves with the use of tear gas and flash bang grenades. *Id.* The *Marasco* court held that Smith had proffered sufficient facts to make the question of whether the defendant officers used excessive force in deploying tear gas and flash bang grenades appropriate for resolution by a jury. *Id.* at 516. In making this determination, the court stated that the ERT were approaching only one man, not a large group and there were no hostages inside the house. *Id.* Although officers were aware that Smith was mentally unstable and was possibly possessing a firearm, there was no indication that Smith had been using a gun recently or that Smith had ever used a gun in a violent manner. *Id.* at 517. The officers were not attempting to make an arrest at the time they decided to use the tear gas and flash bang grenades, and there was no indication in the record that Smith had any history of violence which the officers would have been aware of. *Id.* Lastly, the court held that a

jury should be allowed to hear the testimony of Smith's police expert who was of the opinion that the officers behavior was unreasonable and unlawful. *Id.*

In the absence of controlling precedent from our circuit, courts look to other circuits to ascertain whether there was such a clear trend in the case law that the recognition of the right by a controlling precedent was merely a matter of time. *See Cleveland-Perdue v. Brutsche,* 881 F.2d 427, 431 (7th Cir.1989). There are other decisions from our sister circuits that are "closely analogous" to the situation before us so as to put the Defendant Officers on notice that their decision to use tear gas against Escobedo was an unreasonable use of force *See, e.g., Vinyard v. Wilson,* 311 F.3d 1340, 1349 (11th Cir.2002) (officer used excessive force under *Graham* where he pepper sprayed a handcuffed and confined detainee); *Greene v. Barber,* 310 F.3d 889, 898 (6th Cir.2002) (officers conduct might be found to be excessive force where officer used pepper spray on individual who was arrested for non-severe crime and who was not threatening anyone's safety or attempting to evade arrest by flight even though individual may have been actively resisting arrest and refused to be handcuffed); *Slakan v. Porter,* 737 F.2d 368, 372 (4th Cir.1984) (prison guard's use of tear gas "unquestionably crossed the line separating necessary force from brutality" where prisoner was locked in his cell and posed no direct physical threat to other inmates or any of the guards); *Adams v. Metiva,* 31 F.3d 375, 387 (6th Cir.1994) (a reasonable officer would know

that spraying mace on a potentially blinded, incapacitated individual would violate the right to be free from excessive force).

Based on controlling precedent from this Circuit and the clear trend in the law from our sister circuits, the clearly established law as of July 19, 2005, established that the use of tear gas is unreasonable when: (1) attempting to subdue individuals as opposed to mass crowds; (2) when the individual does not pose an actual threat; (3) when the individual is not holding hostages; (4) when the individual has not committed a crime and the officers are not in the process of attempting to make an arrest; (5) when the individual is armed but merely suicidal as opposed to homicidal; (6) when the individual is not attempting to evade arrest or flee from the police; and (7) when the individual is incapacitated in some form. Here, like Smith in *Marasco,* Escobedo was alone in his apartment, he was not inciting a riot, making a "large disturbance," holding hostages or making any threats. *See Lock,* 641 F.2d at 496. Like Smith, Escobedo had mental health issues and a gun, but there was no indication that Escobedo had been using a gun recently or that Escobedo had ever used a gun in a violent manner. Unlike Smith, however, who allegedly pointed his gun at the police but where the court still found that the officers' conduct in deploying tear gas and flash bang devices could be found to be unreasonable, Escobedo did not point his gun at anyone but himself. When the officers made their decision to enter the apartment, there was no one else

at risk in the apartment and the reasons given by the officers for entering the apartment at that time were solely traffic concerns and the depleted energy of the officers on the scene; they were not based on any concern that Escobedo was an imminent threat to others. By the time the Defendants entered Escobedo's apartment they had already fired twelve times the incapacitating amount of tear gas into his home. The amount of gas emanating from Escobedo's apartment was so strong that Officer Ebetino had to leave his station outside Escobedo's apartment because he did not have a gas mask. Therefore, taking the facts in the light most favorable to the Estate, Defendant Officers would have known that Escobedo was incapacitated inside the apartment and decided to use more tear gas and flash bang grenades subsequent to the initial gas. The similarity of the facts on the *Marasco* case and of Escobedo's situation placed the Officers on notice that their entry was possibly unconstitutional. *See Hope,* 536 U.S. at 739, 122 S.Ct. 2508.

The Defendants assert that these cases are insufficient to put them on notice because they do not specifically address the use of tear gas where the objective was to force an armed and suicidal person from a dwelling. The *Marasco* case, however, is strikingly similar and exact similarity is not required. *See Hope,* 536 U.S. at 739, 122 S.Ct. 2508 (An official action is not protected by qualified immunity only when the very action in question has previously been held unlawful, rather the unlawfulness must be

apparent "in light of the pre-existing law."); *Chaklos v. Stevens,* 560 F.3d 705, 716 (7th Cir.2009) ("The question is not whether there is a prior case 'on all fours' with the current claim."); *Miller v. Jones,* 444 F.3d 929, 934 (7th Cir.2006) (for a right to be clearly established there does not have to be a prior case with materially similar facts; officials may still be on notice in "novel factual circumstances."). Based on the facts as presented to us in the record and taking them in the light most favorable to the Estate, we find that Defendants' actions in deploying an excess amount of tear gas to extricate Escobedo, a non-threatening, non-violent, non-resisting individual, from his apartment violated a clearly established right and therefore the Defendants are not protected by qualified immunity.

2. Flash Bang Grenades

The Defendant Officers contend that they are entitled to qualified immunity for their decision to use flash bang devices to enter Escobedo's arpartment. We have previously indicated that the use of flash bang devices should be limited and is not appropriate in most cases. In *Molina v. Cooper,* 325 F.3d 963 (7th Cir.2003), while we found that the officers' use of flash bang devices during the execution of a "high risk" search warrant –which was obtained for Molina's home on suspicion of drug activity – was reasonable because Molina had a criminal history that included aggravated assault, was alleged to be the head of a drug distribution organization, was

associated with gangs, was home and had access to a stash of weapons, we expressly stated that "we in no way suggest that the use of flash bang devices is appropriate in every case (or even most cases)." *Id.* at 966 n. 1, 973. In finding that the officers' deployment of flash bang devices was reasonable, we emphasized that the officers had a significant reason to be concerned about their personal safety and we expressly limited our holding to the circumstances presented in that case. *See id.* at 973. In *United States v. Folks,* 236 F.3d 384 (7th Cir.2001), we discussed, in dicta, the potentially serious injuries that may arise from the use of a flash bang device during a search. We suggested that a sufficiently careful (or perhaps reasonable) use of a flash bang device occurs when officers take a moment to look inside a residence or a room to ensure that no one would be injured by the device before tossing it and where officers carry a fire extinguisher to quickly extinguish any fires resulting from deployment of the device. *Id.* at 388 n. 2. We also, in no uncertain terms, pointed out that the use of a flash bang device is justified when "potentially *violent* people [can] be found in [a] house," as opposed to individuals who pose no threat to the police or others. *Id.* at 388 n. 2 (emphasis added). We noted that if the government does not use discretion in when and how they use flash bang devices, they "may [ ] risk significant damage claims from the careless deployment of flash-bang devices." *Id.* In *United States v. Morris,* 349 F.3d 1009 (7th Cir.2003), we explicitly stated that this Court has "often emphasized the dangerous nature of flash-bang devices and

has cautioned that the use of such devices *in close proximity to suspects may not be reasonable.*" *Id.* at 1012. (Emphasis added). We suggested, also in dicta, that the use of a flash bang grenade is reasonable only when there is a dangerous suspect and a dangerous entry point for the police, when the police have checked to see if innocent individuals are around before deploying the device, when the police have visually inspected the area where the device will be used and when the police carry a fire extinguisher. *See id.* at 1012 n. 1.

We also discussed the appropriateness of using flash bang devices in *United States v. Jones,* 214 F.3d 836, 837-38 (7th Cir.2000). In *Jones,* we were disturbed by the officers use of flash bang devices and stated that while the district court found their conduct to be reasonable, we were less certain. *Id.* Specifically, we unambiguously stated that "police cannot automatically throw bombs into drug dealers' houses, even if the bomb goes by the euphemism 'flash-bang device'," particularly where they do not believe the drug dealer is an unusually dangerous individual. *Id.* We found this to be true even though guns are normally used in the drug trade and even where a drug dealer has a prior weapons offense. *Id.* Lastly, while *Jones* was a criminal case that discussed the use of flash bangs in the context of suppressing evidence, we specifically stated that "[i]f this were a damages action seeking compensation for injury to the occupants or to the door, the claim would be a serious one." *Id.*

Other circuits have similarly considered the constitutional limits of using a flash bang device. *See, e.g., Boyd v. Benton County,* 374 F.3d 773, 777-79 (9th Cir.2004) (use of flash bang device unconstitutional use of excessive force where police deployed it without either looking or sounding a warning when there were innocent individuals in a room as well as suspected robbers). Additionally, the court in *Estate of Smith v. Marasco,* 318 F.3d 497, 515-18 (3d Cir.2003), previously mentioned above, discussed the use of flash bang grenades to enter an individual's home where the purpose was not to arrest him and where the individual was non-threatening, mentally unstable and suicidal. The *Marasco* court determined that a reasonable jury could find that the defendant officers' conduct was unreasonable and excessive under the Fourth Amendment. *Id.*

Here, the Defendants first deployed a flash bang grenade as the ERT team made its entry into Escobedo's apartment. The record reflects that the Defendant Officers had no idea where Escobedo was located when they threw the first flash bang into his apartment. Additionally, there is no evidence that the officers visually inspected the area before throwing the flash bang device or that they looked inside, even ever so slightly, to see if anyone else was present that may be injured by the flash bang. The second flash bang device was deployed when the Defendants entered Escobedo's bedroom. The Defendants were only able to force the door open slightly and the room was "pitch black" when they threw the flash bang

grenade. The flash bang device landed next to Escobedo's head when it exploded. The record reflects that Escobedo was blind and deaf when the officers entered his bedroom as a result of the location of the explosion in proximity to his head. Additionally, the Estate's police expert testified that a flash bang grenade should be placed in a room, not thrown or tossed, so as to prevent it from landing in an unintended location.

There is no evidence that the Defendant Officers were carrying a fire extinguisher even though they had previously deployed tear gas accelerants into Escobedo's apartment and, in fact, the initial flash bang device set a fire in Escobedo's apartment because it hit a tear gas canister. Furthermore, as stated previously, drawing all inferences in favor of the Estate, Escobedo was not considered to be a violent, dangerous individual, he was not the subject of an arrest and he did not pose an immediate threat to the police or others. The fact that Escobedo was in possession of a gun does not provide support for the Defendants that their use of flash bang devices was reasonable. *See Jones,* 214 F.3d at 837-38.

On these facts, viewed in the light most favorable to the Estate, the law points only in one direction: the use of the flash bang devices in this case was an unreasonable use of force to which qualified immunity does not apply. As discussed above, through the use of "lucid and unambiguous" dicta, *see Hanes v. Zurick,* 578 F.3d 491, 496 (7th Cir.2009), we have repeatedly expressed our concern with the overuse of

flash bang devices, especially where the circumstances do not warrant such extreme measures. This is because flash bang devices are essentially grenades and can be very dangerous and destructive. Despite the absence of a great deal of precedent in this area, the pertinent holdings and dicta do show a clear trend in the law that addresses the egregious circumstances of this case; even if the contours of the constitutional implications of the use of "flash bang" devices in general is not clear, it is abundantly clear that this case arises in precisely the circumstances that this Court and other circuits have sought to avoid by providing detailed guidance on when the use of flash bang devices is (and is not) appropriate under the Constitution. *See Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (even dicta may clearly establish a right); *see* also *Hanes,* 578 F.3d at 496. If this were a borderline case, perhaps the relative paucity of judicial holdings forbidding the use of flash bang devices as compared to other more fully developed areas of Fourth Amendment jurisprudence would counsel in favor of a generous application of qualified immunity. However, on the facts of this case, the officers' conduct in the use of the flash bang devices so clearly exceeded the bounds of reasonableness in the circumstances that it cannot be said to lie near the "hazy border between excessive and acceptable force" along which qualified immunity shields officers from liability for their snap judgments, if those judgments prove to be wrong upon further reflection.

Based on the pre-existing case law, it was clearly established as of July 19, 2005, that throwing a flash bang device blindly into an apartment where there are accelerants, without a fire extinguisher, and where the individual attempting to be seized is not an unusually dangerous individual, is not the subject of an arrest, and has not threatened to harm anyone but himself, is an unreasonable use of force. Therefore, taking the facts as presented to us from the district court, the Defendants are not entitled to qualified immunity and the issue of the officers' decisions must be presented to a jury.

III. Conclusion

The district court did not err in denying Defendants' Motion for Summary Judgment based on qualified immunity. Accordingly, we AFFIRM the decision of the district court.

MANION, Circuit Judge, concurring in the judgment in part and dissenting in part.

What started out as a seemingly routine response to Rudy Escobedo's 911 call threatening his own suicide descended into an unfortunate and certainly disturbing result. In hindsight, at least, the response to his threat likely should not have gone much beyond the telephone negotiations initiated by Sergeant Taylor and continued by Officer Ebetino. However, communications eventually broke down and

what appears to have been an unnecessary assault with the tear gas and flash-bang devices[1] ensued.

Although I question whether the cases cited by the court clearly established that the officers' use of tear gas violated the Fourth Amendment, I do believe that reasonable officials would have known that using twelve times the incapacitating quantity of tear gas to extricate a person at home alone who had only threatened to harm himself and was not suspected of committing a crime "was unconstitutional without guidance from courts." *Gossmeyer v. McDonald,* 128 F.3d 481, 496 (7th Cir.1997). For that reason, I concur with the court's conclusion that the defendants' use of tear gas was not protected by qualified immunity.

I disagree, however, with the court's conclusion that the defendants are not entitled to qualified immunity for their use of the flash-bang devices. The majority opinion holds that on the date of the incident it was clearly established that the defendants' employment of the flash-bang devices was an excessive use of force. In reaching its conclusion, the court relies upon six cases that involved the use of such devices by law enforcement. But as explained below, those cases neither separately nor collectively clearly established that the defendants' conduct was

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[1] Commonly used by law enforcement, flash-bang devices are non-lethal distraction tools that "generate a loud explosion and a brilliant flash that disorient suspects." *See* "police:: explosives," http:// www. search. eb. com/ eb/ article- 260942 (last visited January 29, 2010).

unconstitutional. And because the defendants' use of the flash-bang devices – unlike their use of the tear gas – was not obviously in violation of the decedent's constitutional rights, they are entitled to qualified immunity on this issue.

The first of the four cases from this circuit cited in the majority opinion is *Molina v. Cooper*, 325 F.3d 963 (7th Cir.2003) – an excessive force case. There, while executing a search warrant, police used flash-bang devices in entering a basement because they believed a suspect with a criminal record that included an aggravated assault was at home and had access to weapons. *Id.* at 973. The officers believed that no one other than Molina was in the house and "had ample reason to be concerned about their personal safety." *Id.* Although we were careful to not suggest "that the use of flash bang devices is appropriate in every case (or even most cases)," we held that the use of the devices "was reasonable under the circumstances" and did not constitute excessive force. *Id.*

Molina is the most relevant case for the issue confronting us because it is from this circuit, it is an excessive force case involving flash-bang devices, and the discussion of the propriety of using such devices was not dicta. Unfortunately, the court substantially discounts the case by saying that *Molina* "expressly limited [its] holding to the circumstances presented." *Ante*, at ___. But nearly all excessive force cases are fact-specific and context-dependent, *Scott v. Edinburg*, 346 F.3d 752, 756 (7th Cir.2003), and that

does not limit the relevance of such cases in qualified immunity analyses. *Molina* speaks for itself: where police are executing a search warrant and believe that a person with a record of aggravated assault is at home alone with access to weapons, the use of flash-bang devices is appropriate. 325 F.3d at 973. Here, as in *Molina*, no one else was present in the dwelling where the police used flash-bang devices to incapacitate a person who possessed a weapon. But this case is not on all fours with *Molina*, mainly because Escobedo had no history of aggravated assault and the defendants were not executing a search warrant. Nevertheless, *Molina*'s relevance to the qualified immunity analysis here is significant and should be recognized as the leading authority in this circuit.

The court should not simply confine *Molina* to its facts and then derive "detailed guidance" from what it calls "'lucid and unambiguous' dicta" in three evidence suppression cases from this circuit. *Ante* at ___. In those three cases, the statements that were critical of the police's use of flash-bang devices were dicta – as the majority opinion rightly recognizes. Although we have stated that in limited circumstances dicta can clearly establish the existence of a constitutional right, the dicta must be "lucid and unambiguous," as when a court observes that certain conduct violates a constitutional right but ultimately holds that the right was not clearly established. *Hanes v. Zurick*, 578 F.3d 491, 496 (7th Cir.2009). The dicta in those three cases does not come close to

meeting that high standard: in none of them did we conclude that the use of flash-bang devices constituted excessive force.

In *United States v. Jones*, 214 F.3d 836 (7th Cir.2000), the defendant appealed the denial of his motion to suppress evidence that was obtained by police during a no-knock entry into his dwelling using a battering ram and a flash-bang device. We chastised the police's use of the flash-bang device because (unlike here) an innocent adult and child were inside the apartment. *Id.* at 838. The district court had held that the officers' conduct was reasonable in all respects; we said we were "less certain," although we did not say that the district court was wrong. *Id.* at 837. We also stated that "police cannot *automatically* "employ flash-bang devices just because they are entering the house of a drug dealer. *Id.* (emphasis added). That proposition is unremarkable and in fact implies that such devices are appropriate in some situations. In addition, we noted that were the action one for personal injury it "would be a serious one"; but *Jones* was not a personal injury action, "so whether one would succeed is not something we need [ed to] decide." *Id.* at 838.

In *United States v. Folks*, 236 F.3d 384 (7th Cir.2001), a suppression case similar to *Jones*, the defendant appealed the denial of his motion to suppress evidence from a dwelling search where the police used a flash-bang device in an unlit residence at night. After quickly looking inside, the officers deployed the device, and when they entered they

encountered an armed man and the defendant. *Id.* at 387. The court determined that the evidence was admissible under the inevitable discovery doctrine but acknowledged the serious damage flash-bang devices can cause, observing that "[t]he government may thus risk significant claims from the careless deployment of flash-bang devices." *Id.* at 388. But focusing on the specific facts of the case, the court concluded that the police's use of a flash-bang device *was* sufficiently careful because the officers had looked into the residence before tossing the devices and had carried a fire extinguisher to put out any resulting fires. *Id.* at n.2. The use of the device was justified, we thought, because the police's suspicions that potentially violent people might be at home were confirmed. *Id.* We did not suggest, however, that not using the same cautious measures would necessarily be an excessive use of force. Yet here, the court lists the sufficient precautionary actions the police took in *Folks* and treats them as if they are *necessary* measures for the proper use of flash-bang devices.[2] *Ante*, at ___, ___-___.

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[2] The court also suggests that *Folks* is unlike this case because there were potentially violent people present there. *Ante*, at ___ ___, ___. In doing so, the court appears to define violent persons as only those who pose a threat to police or others. A person who is high on cocaine, has a gun, and is threatening to kill himself is certainly a potentially violent individual. Police cannot be expected to assume that when they encounter such a person, he poses no threat of violence to them

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And in *United States v. Morris*, 349 F.3d 1009 (7th Cir.2003), the defendant attempted to suppress weapons found during a search of his residence and his inculpatory statements because the police had unreasonably used flash-bang devices to facilitate the search. In *Morris*, we cited *Jones* and *Folks* for the manifest proposition that flash-bang devices are dangerous. *Id.* at 1012. But we also stated that the police's use of the devices in that case appeared to be *reasonable* because of the dangerous individuals involved, the dangerous entry point for police, and the precautionary measures the officers took: asking whether children were present, inspecting the area where the devices were to be employed, and carrying a fire extinguisher. *Id.* at 1013 n.1. We did not suggest, however, that the use of flash-bang devices under different and possibly less dangerous circumstances and with fewer precautions taken by police would necessarily be unreasonable. Still, the court treats police measures that were sufficient to approve employment of the flash-bang devices in *Morris* as required measures here when it reads *Morris* as suggesting that "the use of a flash bang grenade is reasonable *only* when there is a dangerous suspect and a dangerous entry point for the police, when the police have checked to see if innocent individuals are around before deploying the device, when the police have visually inspected the area where the device will

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merely because he has not previously expressly threatened them or others.

be used and when the police carry a fire extinguisher."[3] *Ante* at ___ (emphasis added).

The court also cites two cases from outside this circuit. In *Estate of Smith v. Marasco,* 318 F.3d 497, 517 (3d Cir.2003) (*Marasco I*), the Third Circuit concluded that the district court erred in granting summary judgment for the officers on the plaintiffs' excessive force claim because the plaintiffs had "proffered evidence sufficient to require that the question of the reasonableness of the [officers'] tactics be submitted to a jury." *Marasco I* was not a qualified immunity case, and the court merely held that a jury question existed on whether the facts established excessive force. *Id.* at 518. Indeed, it "recognize[d] that a jury could conclude" that the force used "was a reasonable response to the threat the officers perceived." *Id.* at 517. *Marasco I* thus provides little (if any) guidance here: a holding that a particular employment of flash-bang devices *could* (or could not) be an excessive use of force does not clearly establish anything.

The only case cited by the court that actually held that a particular use of flash-bang devices was an excessive application of force is *Boyd v. Benton County,* 374 F.3d 773 (9th Cir.2004). There, the Ninth

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[3] The court does not mention the similarities between this case and *Morris*: as discussed below, the officers were faced with a dangerous entry point and believed they could be encountering a dangerous person.

Circuit concluded that throwing a flash-bang device blindly into a room occupied by up to eight innocent bystanders and criminal suspects was unconstitutionally excessive force. *Id.* at 779. Hence, in the Ninth Circuit it appears to be clearly established that when pursuing armed suspects, the police cannot blindly toss a flash-bang device into a room occupied by up to eight people who were unconnected to the crime under investigation. Here, however, in sharp and material contrast to *Boyd,* there were no innocent bystanders present but only an armed, suicidal individual who was high on cocaine. And the defendants' failure to look into Escobedo's bedroom before they deployed the flash-bang device is not surprising: he had barricaded the door. Moreover, in this circuit *Molina* demonstrates that it is not unreasonable for police to use flash-bang devices when they believe that the only occupant in a dwelling is armed and thus they have "ample reason to be concerned about their personal safety." 325 F.3d at 973. *Molina* – not *Boyd* – is the controlling precedent, and it supplied a sound basis for the defendants' use of the flash-bang devices. Perhaps the only thing clear here is that the cases the court relies upon did not give the defendants notice and it was not clearly established that their conduct was unlawful. In my view, and in the words of the Supreme Court,

> [t]hese . . . cases taken together undoubtedly show that this area is one in which the result depends very much on the facts of each case. None of them squarely governs the case here; they do suggest that [the officers'] actions fell

> in the "hazy border between excessive and acceptable force." The cases by no means "clearly establish" that [their] conduct violated the Fourth Amendment.

Brosseau v. Haugen, 543 U.S. 194, 201, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (per curiam) (citation omitted).

This case is obviously not over. The question remains whether it was reasonable for the police to go to this extent in effect to rescue a man who was threatening suicide. I assume the building had been cleared of other occupants (given the extensive tear gas use, anyone remaining would have likely exited on their own accord). Once communications broke down and the SWAT team arrived, the officers in charge thought it was necessary to employ these extreme resources when the only apparent threat was that of Escobedo to himself. Once the place was saturated with tear gas and the four officers were ordered to enter the apartment, a new scenario involving the use of flash-bang devices emerged. In order to determine what is reasonable under these circumstances, the conditions that existed when the four officers reached the apartment door have to be isolated and separated from the original decision to deploy the SWAT team and to use what was obviously an excessive amount of tear gas. In other words, regardless of whether the initial assault and tear gas saturation was reasonable, at this point the four officers were ordered to force their way in. When they reached the door of the apartment, they were wearing gas masks because of the tear gas saturation.

Unfortunately, this necessity limited their vision and their hearing. They knew Escobedo was high on drugs, was in possession of a gun, and had refused to come out. Clearly this presented a dangerous entry point for the officers, which may have justified employment of the flash-bang devices. When they reached the bedroom door that was substantially blocked, other than to retreat, the flash-bang devices may have been their safest option.

In conclusion, the law at the time of the incident did not clearly establish that the defendants' employment of flash-bang devices was an unconstitutional application of force, nor was their use of such devices patently violative of Escobedo's Fourth Amendment rights. Therefore, I would reverse the district court's contrary decision and conclude that the defendants are entitled to qualified immunity for their employment of the flash-bang devices.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

ESTATE OF RUDY ESCOBEDO	)	
Plaintiff,	)	CAUSE NO.:
v.	)	1:05-CV-424-TS
CITY OF FORT WAYNE, et al.,	)	
Defendants.	)	

OPINION and ORDER

(Filed May 5, 2008)

This is a civil rights lawsuit against the City of Fort Wayne and members of the Fort Wayne Police Department under 42 U.S.C. § 1983 for violations of constitutional rights and under Indiana Code § 34-23-1-2, the Indiana Tort Claims Act (ITCA), for wrongful death. The Plaintiff, Raquel Hanic, the personal representative of the estate of Rudy Escobedo, alleges that the Defendants used excessive force and committed other constitutional violations against Escobedo during a July 19, 2005, standoff that ended when police fatally shot Escobedo in his apartment.

BACKGROUND

On December 20, 2005, the Plaintiff filed a complaint [DE 1] naming the City of Fort Wayne and

certain members of the Fort Wayne Police Department, in their individual capacities, as Defendants: Martin Bender, Douglas Lucker, Kevin Hunter, Kevin Zelt, Brian Martin, Jason Brown, Scott Straub, Bernard Ebetino, Derrick Westfield, Shane Lee, and Tim Selvia. On January 26, 2006, the Defendants answered the complaint [DE 13]. On January 16, 2007, the Plaintiff moved [DE 34] to dismiss Defendants Lee and Westfield from the case, and on January 22, 2007, the Court granted [DE 40] the motion. Also on January 16, 2007, the Defendants filed a motion for summary judgment [DE 37] along with thirty-one attachments. On March 22, 2007, the Plaintiff filed a Response [DE 49] and designated as evidence seventy-five attachments. On June 29, 2007, the Defendants filed their Reply [DE 72].

On the same date, the Defendants filed a motion to strike the affidavit of Larry Danaher [DE 73], the Plaintiff's expert witness, to preclude the Court from considering it when analyzing the summary judgment motion. On July 20, 2007, the Plaintiff filed a Response [DE 82] to that motion.

On July 20, 2007, the Plaintiff filed a Surreply [DE 83] to the motion for summary judgment with three attachments. On July 31, 2007, the Defendants filed a Response [DE 88] to the Plaintiff's Surreply, attaching two affidavits.

On January 31, 2008, the Court held a telephone conference [DE 97] with the parties and advised them that it would deny the Defendants' motion to strike

the affidavit of Danaher. On March 7, 2008, the Court issued an opinion and order [DE 100] denying the Defendants' motion to strike.

SUMMARY JUDGMENT STANDARD

The Federal Rules of Civil Procedure mandate that motions for summary judgment be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Rule 56(c) further requires the entry of summary judgment, after adequate time for discovery, against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

A court's role is not to evaluate the weight of the evidence, to judge the credibility of witnesses, or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986); *Doe v. R.R. Donnelley & Sons Co.*, 42 F.3d 439, 443 (7th Cir. 1994). To determine whether any genuine issue of fact exists, the court must pierce the pleadings and assess the proof as presented in depositions, answers to interrogatories, admissions, and affidavits that are part of the record. Fed R. Civ. P. 56(c), Advisory Committee Notes, 1963

Amendments. The party seeking summary judgment bears the initial burden of proving there is no genuine issue of material fact. *Celotex*, 477 U.S. at 323. In response, the nonmoving party cannot rest on bare pleadings alone but must use the evidentiary tools listed above to designate specific material facts showing that there is a genuine issue for trial. *Id.* at 324; *Insolia v. Philip Morris Inc.*, 216 F.3d 596, 598 (7th Cir. 2000). A material fact must be outcome determinative under the governing law. *Insolia*, 216 F.3d at 598-99. Although a bare contention that an issue of fact exists is insufficient to create a factual dispute, the court must construe all facts in a light most favorable to the nonmoving party as well as view all reasonable inferences in that party's favor. *See Bellaver v. Quanex Corp.*, 200 F.3d 485, 492 (7th Cir. 2000). However, "[i]nferences that are supported by only speculation or conjecture will not defeat a summary judgment motion." *McDonald v. Vill. of Winnetka*, 371 F.3d 992, 1001 (7th Cir. 2004). The court must consider the evidence as a jury might, "construing the record in the light most favorable to the nonmovant and avoiding the temptation to decide which party's version of the facts is more likely true." *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1009 (7th Cir. 1999); *see also Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003) (noting often stated proposition that "summary judgment cannot be used to resolve swearing contests between litigants"). The court may not grant summary judgment "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

Pursuant to local rule, the Court is to assume that the facts claimed by the moving party and supported by admissible evidence are admitted to exist without controversy, except to the extent such facts are controverted in a "Statement of Genuine Issues" filed in opposition to the motion and supported by admissible evidence. N.D. Ind. L.R. 56.1(b).

MATERIAL FACTS

Construing all facts in a light most favorable to the Plaintiff, and drawing all legitimate inferences in favor of the Plaintiff, the following facts are assumed true for the purposes of summary judgment

A. Background Information About the Defendants

Because the Plaintiff named a large number of Defendants in this lawsuit and because many members of the police department were involved with the incident but are not named as Defendants, it is necessary to set forth the positions and roles of Defendants and other members of the Fort Wayne Police Department.

The commander in charge of the scene was Deputy Chief Martin Bender, who was located at the mobile tactical operations center at the northwest corner of Berry Street and Fairfield Avenue. (Bender Dep. 37:21-38:13, DE 51-12.) Deputy Chief Douglas Lucker also was present at the scene on two

occasions. Chief of Police Russell York was at the scene for a short time but then left for police headquarters.

Next in the line of command were Sergeant Kevin Hunter, head of the Crisis Response Team (CRT), or the negotiaters, and Lieutenant Kevin Zelt, head of the Emergency Response Team (ERT), or the tactical officers, commonly referred to as a SWAT team.

The CRT is a unit of six to ten officers who function as negotiators during standoffs with suspects. (Zelt Dep. 26:24-27:11, DE 51-19.) CRT works in conjunction with ERT during these situations. (*Id.* at 26:20-223.) In this case, Officer Bernard Ebetino was the negotiator; Officer Lorna Russell served as his coach; Officer Sofia Rosales (as well as Detective Jonathan Bowers at different times) recorded a timeline of events; and Officer Victor Torres (as well as Bowers at different times) relayed information to the CRT commander, Hunter. (Ebetino Dep. 47:10-19, 48:5-24, 83:7-23, DE 51-21; Hunter 1st Dep. 60:1-22, DE 51-20.)

The ERT was composed of: Officer Brian Martin, Officer Jason Brown, Officer Scott Straub, Sergeant Tim Selvia, Officer Derrick Westfield, Sergeant Shane Lee, Sergeant Jonathan Noll, Sergeant Scott Caudill, Officer Juan Barrientes, Officer Aaron Demeritt, Officer Albert Davis, and others. (Def. Ans. to Pl. Interrog. No. 21, DE 56-2 at 24.)

The ERT members formed different units and performed different functions. Martin, Davis, and Barrientes fired the tear gas rounds into Escobedo's apartment. (Def. Ans. to Pl. Interrog. No. 34 at 2, DE 56-4.) The team that entered Escobedo's apartment was led by Selvia and also included Martin, Brown, Straub, Westfield, and Lee. (Selvia Dep. 65:3-9, DE 51-10.)

Demerritt and Noll paired up to serve as observers and sharpshooters outside the apartment building. (Demeritt Rpt.1, DE 53-2; Noll Rpt. 1, DE 53-5.) Caudill also served as an observer and sharpshooter, positioning himself on the west side of the building. (Caudill Rpt. 1, DE 53-7.) A number of other officers established and manned the outer perimeter, dealt with traffic issues, or handled other matters that are not materially relevant to the motion for summary judgment.

B. Escobedo's 911 Call

This incident began with Escobedo seeking the help of authorities. On July 19, 2005, at 4:24 a.m., he dialed 911. Escobedo told the dispatcher that he was armed with a gun, would shoot himself, believed police were just outside or even in his apartment, and feared police would shoot him. He also told the dispatcher that he had recently begun using drugs again, he was high on cocaine at the moment, and he was taking Antabuse for his alcohol problem. On a few occasions during the call, it appears Escobedo

was delusional because he addressed officers that he (incorrectly) believed were in his apartment. "Get out of my house. I'm gonna shoot myself you guys." (911 Call Tr. 7; DE 37-28). Near the end of the call, he said that members of a task force or the SWAT team were in his apartment.

Escobedo asked the dispatcher to call James Cates, a psychologist from whom Escobedo had received counseling services over the course of several years ending in December 2004 or January 2005 (Cates Dep. 54:2-4, DE 51-3; Hunter Rpt. 1; DE 53-4), and he provided a phone number for Cates. At several points Escobedo made clear that he was seeking help: "I just want help." (911 Call Tr. 4.) "Please let them talk. Please let me talk to someone. . . . I want to talk to someone on the phone, but I'm, I'm hiding right now cause they're, they're all over the windows." (*Id.* at 10.)

While Escobedo threatened to commit suicide many times, he also expressed a fear of being killed by police. Escobedo never made any explicit threats toward police or other persons, besides himself, during this call. "I don't want to get shot either. I'm not going to shoot them." (*Id.* at 2). "I swear to God, if they shoot me, I'm gonna kill myself. I'm not gonna hurt anybody. I just want help." (*Id.* at 4.) "I swear to God if they come in here. I'm not gonna . . . And I'm not gonna kill them or shoot them. I don't want to die." (*Id.* at 5.) "I don't want to have a gunfight with a cop. I respect the police." (*Id.* at 9.) "I do not want to get killed by a cop." (*Id.* at 11.)

The overall tone of the call indicates that Escobedo was in despair about his drug addiction and his life in general, and that he was suicidal. "I want to die right now because I'm a drug addict." (*Id.* at 6.) "Why am I doing this to myself right now? This is, I'm over. My life is over. When they shoot me. . . . It's stupid for them to come in here cause I am gonna shoot myself. I don't want to hurt anybody." (*Id.* at 8-9.) "I don't want to hurt anybody. I would never hurt anybody other than myself. I don't want to get shot by a cop, but I will kill myself because I don't want to live." (*Id.* at 9.)

Escobedo's apartment was on the seventh floor of an apartment building at 530 West Berry Street. The block is bordered by Fairfield Avenue and Fulton Street, running north and south, and West Main Street on the north side of the block. Escobedo's apartment windows faced west toward Fulton Street. (Bender Dep. 55:22-56:7.)

C. Initial Response

Sergeant C.M. Taylor was the first officer to speak with Escobedo, though two other officers (Craig Fairchild and Jeffrey Foust) had arrived first and established a perimeter around his apartment door on the seventh floor. Fairchild brought a shotgun loaded with beanbag rounds. Foust told dispatch and Taylor that, when he knocked on Escobedo's door, he heard what he thought to be the sound of a bullet

being chambered into a handgun. (Taylor Dep. 15:20-16:3, DE 51-18.)

Taylor obtained Escobedo's number from the dispatch center and called Escobedo at about 4:55 a.m., shortly after Escobedo's call with dispatch had ended. Taylor used his personal cellular phone to make the call. Escobedo told Taylor that he was armed and planned to commit suicide. (*Id.* at 21:20-22.) Escobedo continued to make statements of the sort he had made to the dispatcher. (*Id.* at 19:21-23, 21:1-6.) Taylor said that Escobedo "appeared to be irrational and delusional." (*Id.* at 21:10-11.) Escobedo again mentioned Cates, but did not specifically request to speak with Cates. (*Id.* at 22:20-23:4.) The dispatch center called an office number for Cates and left a message because Cates could be a source of information for police. (*Id.* at 23:4-10.) Taylor believed that Escobedo was moving objects inside his apartment. (*Id.* at 20:10-12.) After about twenty or twenty-five minutes, Taylor decided that CRT and ERT should respond to the situation and he asked another sergeant at the scene to make the request. (*Id.* at 27:15-28:11.) Taylor continued to speak with Escobedo, who gave the same type of responses as he had earlier. Taylor testified in his deposition that he did not recall Escobedo making any statements that were threats against the public or the police. (*Id.* at 38:21-39:6.)

Over the next hour and a half, members of the CRT and ERT began arriving on the seventh flooor. Taylor began the process of transferring the phone

call to Ebetino, the negotiator for CRT. Taylor briefed Ebetino about the situation, including the fact that Escobedo was armed. Taylor also spoke with Bowers and Rosales of CRT about Cates. He also spoke with Selvia of the EST. After that, Taylor reported to the incident command center and told Bender and Hunter that he was unable to communicate effectively with Escobedo. He later left the scene and typed his report.

D. Ebetino's Negotiations and the CRT

Ebetino took over negotiations with Escobedo at about 5:42 a.m. and continued to use Taylor's personal cellular phone. Escobedo repeated that he was suicidal and armed. He also asked to speak with Cates and said he wanted help and medicine for his drug addiction. (Ebetino Rpt. 1; DE 53-3.)

Rosales recorded the timeline of events, Russell coached Ebetino, and Torres relayed information to the command post by radio. (Ebetino Dep. 47:10-48:9.) Bowers spent some time recording the timeline and also participated in relaying information. (Hunter 1st Dep. 60:9-19.) At approximately 6:23 a.m., the CRT began using a "direct link phone system," a device that allowed several other officers on the seventh floor to listen to the conversation between Escobedo and Ebetino. (Ebetino Dep. 63:14-64:1; Ebetino Rpt. 1.) The device does not record the conversation. (Ebetino Dep. 62:16-17.)

When the switch was made to the direct phone link system, Ebetino also stopped using Taylor's cellular phone because it was running low on batteries. Ebetino began using Rosales's personal cellular phone. (Ebetino Affid. 2, DE 88-2; Rosales Affid. 2; DE 88-3.)[1] No police officer used Taylor's cellular phone during the rest of the incident. (*Id.*) It is not clear what Ebetino did with Taylor's phone or whether the phone ran out of power. There is no evidence in the record that Escobedo was told of the change in phones or given the new phone number in case the call was terminated.

Escobedo's comments to Ebetino continued to include threats of suicide and a fear of being killed by police. (Ebetino Dep. 67:11-15.) At times, the conversation took a positive turn, (*e.g.*, Ebetino Dep. 111:2-16, 107:22-108:1), and Ebetino believed Escobedo was

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[1] The fact that Ebetino switched from Taylor's cellular phone to Rosales's is not reflected in Ebetino's written report, written on July 19, 2005, after the incident ended, or made explicit in his deposition, which occurred in 2006. Ebetino made the signed, sworn affidavit on July 27, 2007, which is several weeks after the Plaintiff in her July 20, 2007, Surreply [DE 83] raised the issue that Escobedo attempted to reestablish contact with police by calling Taylor's cellular phone number after tear gas rounds were fired into his apartment and before officers entered his apartment. There is no deposition of or statement by Rosales in the record other than her July 26, 2007, affidavit. A timeline log entry for 6:23 a.m. only indicates that a "throw phone," a communication device that police will insert into a structure for a subject to use, was in use at that time. (*See* DE 88-2 at 6.) It does not state that police switched from Taylor's phone to Rosales's.

close to surrendering (*id.* at 78:17-22). But Escobedo would always return to comments about suicide, fear of being killed by police, and his addictions. "I believe that there were times I thought we were making real progress and that we'd be done soon and he'd be coming out and then all of a sudden he would say something to lead me to believe that he had no intention of coming out any time soon." (*Id.*).

At one point, Ebetino told Escobedo that police were trying to contact Cates and bring him to the scene so that Escobedo could speak to him when he left his apartment. (Ebetino Dep. 70:14-20.) Hunter eventually spoke with Cates by phone shortly after 8 a.m. Hunter did not invite Cates to come to the scene. (Hunter 1st Dep. at 89:3-5.) Hunter was unsure if he relayed to Cates Escobedo's request to speak with Cates (*Id.* at 88:4-6). Hunter recalled that Cates said it would be difficult to deal with Escobedo if he was under the influence of drugs and alcohol, (Hunter Rpt. 1, DE 53-4; Hunter 1st Dep. 89:6-90:2), and also that Cates did not think Escobedo had a history of using weapons or attempting suicide. (Hunter Rpt. 1).

Throughout the conversation, Escobedo often left the phone for a period of time but did not end the call. (Ebetino Dep. 93:22.) Ebetino asked Escobedo to leave his apartment unarmed, asked him about his problems, told him that Ebetino wanted to help, and asked him not to shoot himself. (*Id.* at 77-80.) Ebetino did not believe that Escobedo made or constituted a threat to the police or to the public, (*id.* at 117:12-16), except "the only indication . . . was when he said that

he wanted to come out of the apartment with the gun." (*Id.* at 137:9-12.) This statement occurred at 8:28 a.m., (*id.* at 118:5-14), which was after supervisors had decided at about 8 a.m. to fire tear gas into the apartment and then enter the apartment (Bender Dep. 69:17-70:19).

Ebetino believed sounds from the apartment, as well as Escobedo's comments, indicated that Escobedo was barricading the door with furniture. (Ebetino Dep. 93:8-19.) At other times, it sounded as if Escobedo was removing the barricade by the door. (*Id.* at 107:18-23.) At 7:27 a.m., Ebetino heard what he believed was Escobedo removing the barricade from the door. (*Id.* at 107:18-24.) Ebetino assumed this information was conveyed to the commanders. (*Id.* at 108:2-12) At this point, Ebetino believed he was making progress with Escobedo.

At 7:38 a.m., Escobedo said he wanted to speak to his sister, (*id.* at 110:12-18) and later that he wanted her to meet him at Parkview Hospital, which Ebetino interpreted as a positive sign (*id.* at 111:2-16). At 7:51 a.m., Escobedo told Ebetino he was moving objects away from his door, but Ebetino was unsure of what Escobedo was really doing. (*Id.* at 114:1-16.)

Escobedo's comments and responses were ambiguous. At some point in the final hour of negotiations, Escobedo "told me that he was sorry and that he hated to cause me so much trouble because he liked me." (*Id.* at 129:22-24, Ebetino Rpt. 1.) Ebetino called that "a bad sign," (Ebetino Dep. 130:12-14), but

Escobedo also made comments later that "were more encouraging." (*Id.* at 130:21-22.) Despite some of the positive signs from Escobedo, Ebetino did not have much confidence in Escobedo's mental state. "I was under no impression that he was becoming more rational. At best, I thought he wasn't getting worse." (*Id.* at 115:24-116:2). "The longer we went on, the less confident I was of [Escobedo coming out of the apartment]." (*Id.* at 153:21-22.)

E. Discussion of Tactical Response

While Ebetino negotiated with Escobedo, Hunter, Zelt, and Bender discussed their options. Accounts differ about when the police first mentioned and discussed the idea of using tear gas against Escobedo. Ebetino stated that at 6:45 a.m. he "was informed that EST was considering introducing gas to try and have him retreat from the apartment and come out to us, but we were still carrying on our conversations." (Ebetino Dep. 100:17-20.) Hunter's after action report for the CRT said Zelt mentioned the idea later, at approximately 8 a.m. (CRT After Action Rpt. 2, DE 56-10.) Bender also recalled first discussing the idea tear gas and entry at around 8 a.m. (Bender Dep. 69:17-70:19.)

Bender had overall authority over the incident and the scene (Bender Dep. 46:23-47:2) but relied on Zelt to "choose the tactics" against Escobedo and on Hunter for information about negotiations. (*Id.* at 52:2-11.) Hunter relayed Escobedo's changing

attitudes about surrendering and then threatening suicide to Bender. (*Id.* at 52:2-11.) Bender admitted that he "never heard anything that it was getting to the point where it was becoming worthless to negotiate with him." (*Id.* at 52:8-11.)

However, Bender said the key factor in his decision to take action against Escobedo was that by 8 a.m., after consulting with Lucker, Zelt, and Hunter, "it was our belief that the negotiations were not going anywhere." (Bender Dep. 69:16-24.) Bender said that Hunter "felt that the negotiation process was not going well and was pretty much at a dead end." (*Id.* at 120:5-8.) Bender said he was told that Escobedo would at times hang up the phone and then take a call from police after 10 or 15 minutes. (*Id.* at 120:15-19.) "Basically, the input that I was receiving is that he was not willing to talk anymore." (*Id.* at 120:20-21.)

Bender said pedestrian and vehicle traffic was increasing and "we were starting to develop a scene that was being chaotic, as far as being able to control the pedestrian and motor vehicle traffic." (Bender Dep. 69:24-70:4.) Bender was told by Hunter that Ebetino heard noises suggesting that Escobedo was barricading and/or fortifying his apartment, which also warranted the force. (*Id.* at 71:4-10.) Bender said he did not remember knowing or learning that Escobedo was afraid of the police and that Escobedo said he would not hurt or shoot the police. (*Id.* at 42:4-11.)

But later Bender also said Escobedo was a threat to the public because of "the mere fact that he was armed with a weapon and threatening to commit suicide, he was a threat to himself and if, you know, he wanted to commit suicide or have us do it for him, if he was to start opening fire out the window at other civilians who may have been on the street, that would have constituted an emergency." (*Id.* at 98:24-99:15.) Bender said officers were at risk because Escobedo "could have shot through the door at an officer. . . . He could have shot out the window and wounded or killed an officer, and the same thing for the general public. (*Id.* at 109:17-21.)

Hunter, as the leader of the CRT, was passing along information about the negotiations to Zelt and Bender. (Hunter Dep. 76:11-22.) Hunter had to rely on information from Bowers and Torres. (*Id.* at 60:12-19.) Normal procedures call for Hunter, as the CRT leader at the scene, to listen to negotiations via the direct link system, but he did not do so. (*Id.* at 84:8-20.) As a result, Hunter did not always learn about important information and accordingly could not inform Zelt and Bender about it. For example, Hunter said he did not recall hearing or learning that Escobedo had removed objects from his apartment door, something that would have been considered a sign of progress. (*Id.* at 85:3-11.)

In essence, Hunter was told and then relayed that negotiators were not making progress with Escobedo. "During the negotiation process . . . , I was kept informed by Detective Bowers of the progress or

lack of in this situation." (CRT After Action Rpt. 2; Hunter 1st Dep. 74:12-77:2; Hunter Rpt. 1.) Hunter said he was unsure if he relayed the information he received from Cates to Zelt and Bender, but admitted that the information would have been important. (Hunter 1st Dep. 90:9-21.)

Zelt first proposed using chemical agents or gas against Escobedo. (Zelt Dep. 102:11-13.) That use of force "is standard procedure" and "the next logical step" when communications or negotiations with a person are not succeeding. (*Id.* at 102:19-103:6.) Zelt said one key piece of information he received from Ebetino that was significant to his decision to advocate the use of chemical agents or gas was that Ebetino "could hear Mr. Escobedo barricading and fortifying his position." (*Id.* at 104:4-5.)

Zelt also said he believed Escobedo had made threats of some kind, but it is not clear if Zelt believed this at the time of the incident or formed that opinion afterwards. "I had information that was relayed to me that he had made what we would consider some veiled threats of some type, possibly, and some direct ones." (*Id.* at 89:8-11.) Zelt said one example of such a threat was Escobedo's statement that he would leave his apartment but bring his gun with him. "[T]hat would seem to be a veiled threat of some type, some type of intent." (*Id.* at 89:13-17.) That statement was made at 8:28 a.m. (Ebetino Dep. 118:5-14.) However, when Zelt was pressed about the matter in a deposition, he could not identify any statement Escobedo made that Zelt knew of at the

time that constituted an explicit threat to the police or public. (Zelt Dep. at 91:10-92.)

Zelt stated that, in reviewing the 911 transcript and other materials after the standoff, he interpreted one comment Escobedo made during the 911 call to be a threat against the police. (Zelt Dep. 92:6-8.) Zelt admitted that he did not know about this statement until after the standoff. (*Id.* at 92:19-93:2). Escobedo's statement was: "If they come in here, I'm shooting . . . I'm, I'm gonna kill myself." (911 Tr. 5) (ellipsis in original). Zelt said that statement "could very well mean" that Escobedo would shoot the police if they entered his apartment. (Zelt Dep. 93:14.) Zelt continued:

> I have to interpret it that way. . . . Because if I am responsible for the safety of my people, then I have to assume the worst. . . . "If they come in here, I'm shooting," he is referring to us. . . . We have no idea of knowing exactly what was on his mind when he said that, but, I take that statement to be a threat.

(Zelt Dep. 93:17-94:1.) Additionally, Zelt said Escobedo had committed the felony crimes of possessing cocaine and being a convicted felon in possession of a firearm, (*id.* at 142:9-19), but the evidence in the record does not establish that Zelt knew of the latter crime during the standoff. Zelt also said "a good case could be made for . . . criminal recklessness." (*Id.* at 142:21-23.) But he acknowledged that the purpose was not to arrest Escobedo but to take him into

custody for a 24-hour emergency mental health detention. (*Id.* at 143:21-23.)

Other factors that led Zelt to advocate the use of tear gas were that police had given Escobedo sufficient opportunity to surrender but there were no indications that he would surrender, and that the readiness of the tactical officers at the scene was deteriorating (Zelt Dep. 149:19-150:15.) Zelt said July 19, 2005, "was a very hot day," and officers were wearing long pants and sleeves along with body armor and other protective gear. (*Id.* at 149:20-150:3.)

> An individual can only function, in that environment, for so long before their readiness starts to deteriorate. Let's keep in mind that, in this case, the suspect was in air conditioned comfort. His readiness is staying the same level, ours is starting to deteriorate. At some point, it will come to a point in time when your readiness is less than the suspect, and that works against us.

(*Id.* 150:3-11.)

Zelt said he chose the deadline of 8:30 a.m for "a tactical intervention," (*id.* at 109:21), because "I thought it was important we do that before the peak downtown hour times came, so that we had less people in the downtown area." (*Id.* at 109:24-110:2.) However, Zelt also admitted that many if not most people working downtown were already there by 8:30 a.m. (*Id.* at 110:2-16.)

Hunter concurred with the decision to use gas on Escboedo's apartment at 8:30 a.m. because "I believed at the time that that was a reasonable course of action. . . . Because in the past the introduction of gas had typically forced a suspect out that would not have normally come outside." (Hunter 1st Dep. 92:13-23.) Hunter said the discussion focused on the potential danger to the increasing number of persons who would be in the downtown area near the apartment building, especially around nearby St. Joseph Hospital. (*Id.* at 91:5-11.) Hunter wrote in his report after the incident that "[i]t was my opinion that we were not making progress and Mr. Escobedo was unstable and most likely impaired by alcohol and drugs. For safety reasons of the surrounding area[,][ ] Zelt had EST members deploy gas. (Hunter Rpt. 1) (text altered from all caps, errant punctuation omitted).

Lucker responded to the scene initially but left shortly after arriving and conferring with Bender and Chief of Police Rusty York. (Lucker Dep. 20:7-15; DE 51-17). He returned later at 7:30 a.m. or 8 a.m. in order "to see if I could be of any assistance, if they needed coffee or anything like that." (*Id.* at 30:21-22.) Lucker said he was not involved with the decisions to send the entry team into the apartment, (*id.* at 30: 14-17), but at the same time, he participated in the discussion with Bender, Zelt, and Hunter (*id.* at 30:22-24). Lucker described his role as "a peripheral part." (*Id.* at 29:2.) However, the Defendants identified Lucker as an official who "participated in the

decision to fire tear gas into the apartment," (Def. Ans. to Pl. Interrog. No. 35, DE 56-4 at 2-3), and also stated: "Defendants will agree that the above individuals [Bender, Lucker, Zelt, and Hunter] were involved in the decision to introduce tear gas or chemical agents." (Def. Ans. to Pl. Interrog. No. 39, DE 56-4 at 4.) It is not clear from the record how long Lucker stayed at the scene with the other supervisors. Bender said he consulted with Lucker, "who is also a former SWAT team commander," (Bender Dep. 69:20-21), and that Lucker "agreed with me" after Bender made the final decision to use force and enter the apartment (Bender Dep. 70:4-8).

Bender said that he phoned Chief York and briefed him on the situation and plan, and that York agreed. (Bender Dep. 70:8-14.) Bender acknowledged that he did not believe Escobedo had committed a crime by that point and that Escobedo had only threatened himself. (Bender Dep. 71:12-20.) In advance of the planned tear gas, Selvia, Westfield, and others attempted to evacuate residents on the seventh floor with limited success. (Selvia Dep. 49:10-24.)

Danaher, the Plaintiff's expert, was extremely critical of the decision to deploy tear gas and enter the apartment at 8:30 a.m. Danaher's main points were that Escobedo did not pose a threat to officers or the public that required the use of force (Danaher Decl. 6, DE 56-11; Danaher Affid. ¶ 17, DE 55-3); the police decision to use force was premature and based on flawed priorities (Danaher Decl. 10; Danaher

Affid. ¶ 17); and the show and use of force was excessive and exacerbated the situation, unnecessarily creating the scenario that led to the fatal shooting of Escobedo (Danaher Decl. 8, 10). Also, Danaher said that Bender and police in general were impatient, and "supervisors valued time over the life of Escobedo." (Danaher Affid. ¶ 33.)

Danaher also made a number of specific criticisms. Escobedo's statements toward the end of negotiations that he might surrender were a positive indication even if it takes a number of such statements before a disturbed person like Escobedo is able to bring himself to follow through and actually surrender. (Danaher Affid. ¶ 16.) The concern about shots being fired toward the hospital works against the Defendants because they initiated a raid where gunfire (by police or Escobedo) was more likely to occur. (Danaher Affid. ¶ 31.) Danaher said he is familiar enough with traffic in Fort Wayne to know it could have been rerouted with minimal inconvenience, and that, in any event, traffic concerns should not have played a role in the decision to use force. (Danaher Affid. ¶ 32.)

F. End of Communication with Escobedo and the Use of Chemicals

After learning that police would deploy tear gas against Escobedo soon, Ebetino continued his attempts to coax Escobedo into surrendering. At one point, Ebetino believed that police planned to fire gas

into Escobedo's apartment at 8:25 a.m. (Ebetino Dep. 119:17-18), but Ebetino's written narrative report of the incident states that EST planned to use the gas at 8:30 a.m. (Ebetino Rpt. 3.) The police did not inform Escobedo of the plan to deploy chemicals or gas against him at 8:30 a.m. (Zelt Dep. 104:16-18.)

At 8:28 a.m., Escobedo told Ebetino he was going to come out of the apartment but he would bring the gun with him, which Ebetino discouraged as unsafe. (Ebetino Dep. 118:6-12; Ebetino Rpt. 3.) At 8:30 a.m., Escobedo said he would come out of his apartment in three minutes. (Ebetino Dep. 118:21-119:24.) Ebetino conveyed to fellow members of the CRT that he wanted another three minutes to negotiate with Escobedo, (*id.* at 53:4-6), and Ebetino believed that this information or request was conveyed to ERT: "[Y]ou could just see that, I could tell by the body language of the people there that, okay, we're going to wait that three minutes. We're going to keep going. We're going to let him come out in three minutes. I could see it in the faces. . . ." (*Id.* at 119:21-120:7).

Ebetino did not ask for more time beyond that three minute reprieve, and he did not ask other members of the CRT to inform the commanders that Escobedo would surrender if Ebetino were given more time to negotiate. (*Id.* at 53:7-14.) As those three minutes elapsed, Ebetino believed "it was obvious that he was not going to come out," and this belief was "[b]ased on my conversation with him. I told him, 'Hey, three minutes sharp you say you're going to

come out,' and he's back to, 'No, I'm not going to come out. I'm going to kill myself.'" (*Id.* at 120:16-22.)

As police prepared to fire the tear gas grenades into the apartment, one of the commanders at the scene told Ebetino to wind down the conversation with Escobedo by claiming the phone connection "was going bad." (Hunter 2nd Dep. 12:6-16, DE 51-2.) The purpose of Ebetino's conversation with Escobedo at this point changed to an attempt to determine where Escobedo was located in the apartment. (Ebetino Rpt. 3.) Ebetino did this for the safety of the officers who planned to enter Escobedo's apartment. "When I was certain that he was not going to come out, I did try and determine his location so that he could not be able to harm the officers if they did in fact, breach the apartment." (Ebetino Dep. 122:10-13.) Ebetino also reported that during those final minutes, "[n]othing led me to believe he was preparing to come out." (*Id.* at 152:21-22.)

As the deadline for using gas approached, the ERT officers on the seventh floor put on gas masks. Selvia said wearing a gas mask makes it difficult to communicate because it muffles your voice "quite a bit" for those nearby and those listening on the radio, requiring the person with the mask to speak slowly. (Selvia Dep. 61:23-62:5.) The other officers said the masks did not affect their ability to see and/or hear. Danaher said, based on his experience as a member and leader of SWAT teams, that gas masks distort the voices of those who wear them and cut down on peripheral vision. (Danaher Affid. ¶¶ 22, 23.) Officers

may become used to hearing other officers wearing gas masks after enough experience so that they can understand commands, but "for any person who has not had such experience, . . . [commands] would sound distorted and sometimes indecipherable." (Danaher Affid. ¶ 22.)

Zelt calculated what he thought would be a "incapacitating concentration" (Zelt Dep. 106:9), of chemicals for Escobedo's apartment. He chose six .37 millimeter liquid rounds, six .37 millimeter Sage powder, and five or ten .12 gauge munitions. (Zelt Dep. 106:18-24.) At 8:33 a.m., Martin, Davis, and Barrientes – stationed behind the armored vehicle located on Fulton Street on the west side of the building – fired the tear gas rounds into the windows of Escobedo's apartment on the seventh floor. (Def. Ans to P. Interrog. Nos. 33, 34, DE 56-2; Martin Dep. 85:16-86:12, DE 51-22.) Martin believed they fired into the bathroom window of the apartment. (Martin Dep. 88:1-11.) Martin said he fired five rounds in the first volley and five rounds in the second volley. (Martin Dep. 89:10-16.) After all the chemical rounds had been fired, there was "twelve times [the] incapacitating concentration in the apartment." (Zelt Dep. 125:10-11.) Danaher, the Plaintiff's expert, said that amount "was clearly and obviously excessive." (Danaher Affid. ¶ 20.)

Zelt was told that police believed most if not all of the chemical rounds went into Escobedo's apartment. (Zelt Dep. 107:15-17.) One or more members of the entry team thought they might have heard coughing

from the apartment, but police received no other response by phone or otherwise. (*Id.* at 107:18-21.) Police waited about ten minutes before Zelt ordered officers to fire the second round of chemical agents into the apartment. (*Id.* at 108:13-15, 113:13-18.)

It is not clear if Ebetino's final request for Escobedo to come out occurred just before or just after gas was deployed. (*See* Ebetino Dep. 123:14-124:3.) Shortly after the gas canisters were fired into the apartment, the fumes became too strong for Ebetino, forcing him and other members of the CRT to flee the area and leave behind the communication equipment. (Ebetino Dep. 124:5-9). This cut off communication with Escobedo. (*Id.* at 124:10-12.) Ebetino had not brought his gas mask from his car to the seventh floor. (Id. at 52:19-24.)

Hunter said that either he or EST suggested to Ebetino that he tell Escobedo that the phone was "going bad . . . in preparation for the deployment of gas." (Hunter 2nd Dep. 12:12-16.) Bowers thought that Selvia told Ebetino to end the phone call by telling Escobedo the phone connection was worsening. (Bowers Rpt. 2; DE 54-6.) As a result, Ebetino ended his phone call before the gas was deployed, according to Hunter. (Hunter 2nd Dep. at 12:23-25.) That was not in accordance with normal procedures. (*Id.* at 13:1-3; Zelt Dep. 100:5-9.) Zelt, the EST commander at the scene, said it also was not standard for a negotiator to leave the scene after chemical agents or gas are used against a subject, (Zelt Dep. 100:11-17), but it occurred here because Ebetino's point of

negotiation was unusually close to Escobedo's apartment and Ebetino did not have a gas mask. (*Id.* at 100:21-101:9.)

It does not appear that anyone shared with Zelt or the ERT entry officers the fact that phone communication was cut off with no plan for re-establishing it. Zelt indicated that he thought Escobedo would be able to negotiate either by communicating "face to face with our members as well," (Zelt Dep. 99:1-2), presumably a reference to EST members, or by continuing to speak to Ebetino by phone even if Ebetino was no longer on the seventh floor. (*Id.* at 99:11-14.) Zelt also said that once the tear gas rounds were fired into the apartment, Escobedo "could pick up the phone and call or he could come out." (*Id.* at 108:9-10.)

Ebetino said that, because of the gas, he would not have been able to continue communicating with Escobedo if he stayed on the seventh floor. After that point, Ebetino stated: "By the time I got down to the operations center I believe they were already firing a second round of gas in there and by that time I didn't believe I would be able to re-establish contact so I made no effort to do so." (Ebetino Dep. 157:3-8.) In other standoff situations, police have continued to communicate with a subject after tear gas was fired. (Ebetino Dep. 157:20-24.)

While the tear gas rounds were being shot into Escobedo's apartment, Escobedo was calling the number of the cellular phone that Taylor originally

used to communicate with Escobedo. (Pl. Surreply 4, DE 83; Escobedo Phone Records 2, DE 83-2.) The records show calls from Escobedo's phone to Taylor's cellular phone number at 8:34 a.m., 8:36 a.m., 8:39 a.m., 8:43 a.m., and 8:45 a.m. (Escobedo Phone Records 2.)

After the second volley of tear gas rounds, police waited another ten minutes without hearing or observing any response. (Zelt Dep. 113: 13-18.) As a result, Zelt ordered Selvia and his team to breach the apartment door and deploy clear out canisters containing tear gas. (Zelt Dep. 113:19-114:1.) Police decided to enter the apartment after the gas failed to force Escobedo out because that is the standard practice of police, and officers needed to check if Escobedo was still alive or secure him and get him to a hospital. (Hunter 1st Dep. 93:20-94:3.)

G. Breach of the Apartment

The EST officers entered the apartment at 8:52 a.m. (Defs. Resp. to Pl. Surreply 3, DE 88.) Except for Brown, all the officers were armed with a MP5 submachine gun, a Glock handgun, or both; both weapons fire .9 mm ammunition. Brown was carrying a Sage SL6, a less-than-lethal shoulder-fired weapon that shoots beanbag rounds meant to stun or disable a person.

A building employee provided a key to the entry team and Selvia tried to use it. Selvia and Westfield believed that the key did not work in the lock. (Selvia

Dep. 60:7-61:7; Westfield Dep. 74:1-3, DE 51-25.) Lee thought the key unlocked the door but that the door did not readily open because it was barricaded. (Lee Dep. 96:18-20, DE 51-11.) Westfield thought that the door had not been barricaded. (Westfield Dep. 74:9-13.) Brown thought the door had been barricaded. (Brown Dep. 48:3, DE 51-24.)

Westfield used a ram to force the door open. An officer then threw a "clear out" canister of tear gas into the apartment. Westfield, Straub, and Martin thought Selvia was the officer who threw the canister, (Westfield Dep. 74:18-20; Straub Dep. 49:22-25, DE 51-26; Martin Dep. 95:20-22), but Selvia and Lee do not remember who threw it. (Selvia Dep. 63:5-6; Lee Dep. 97:22-23). Some officers recall that Selvia yelled into the apartment for Escobedo to surrender, but Selvia did not recall doing so. (Selvia Dep. 63:1-4.)

After waiting a few minutes and receiving no response, a second canister of tear gas was thrown into the apartment. Officers had the same recollection about the person who threw the second canister as they did about the person who threw the first. Police again received no response. This could have been due to the fact that CS gas "almost eliminates your ability to talk clearly. I mean, if you are incapacitated by it, you are not going to be able to speak very well." (Zelt Dept. 137:11-14.)[2] After once again receiving no

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[2] When Zelt made that statement in his deposition, he was referring to Martin's trouble speaking after the seal of his gas

(Continued on following page)

response from Escobedo, the team prepared to enter the apartment.

The plan was to throw a flash bang grenade[3] into the apartment to distract and disorient anyone in the main room in order to give officers time to move through the doorway. (Lee Dep. 102:19-103:2.) The fear is that a person planning an ambush need only aim his weapon at the doorway to hit any officer who tries to enter the apartment. (Selvia Dep. 24:20-25:13.) When the flash bang grenade explodes, it yields an intense light and extremely loud sound. (Selvia Dep. 24:13-17.) It is standard practice or procedure to deploy flash bang grenades when officers enter a barricaded room. (Lee Dep. 103:5-6.) Westfield thought that Selvia threw the flash bang grenade, (Westfield Dep. 75:16-18), but no other officer, including Selvia, could recall who threw it.

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mask was broken after shooting Escobedo. Zelt acknowledged that Escobedo would have had the same problems speaking as well.

[3] Individual Defendants usually referred to these items as "distraction devices" rather than flash bangs or flash bang grenades. The Court will refer to them as flash bang grenades because that term most accurately describes what the items do and what they are used for, and because the term is used more often by the Seventh Circuit. *See United States v. Jones*, 214 F.3d 836, 837-38 (7th Cir. 2000) (calling them concussion grenades and "bombs . . . even if the bomb goes by the euphemism 'flash-bang device'"); *United States v. Morris*, 349 F.3d 1009, 1012 (7th Cir. 2003) (flash-bang devices); *United States v. Folks*, 236 F.3d 384, 388 (7th Cir. 2001) (same).

The officers then proceeded into the room. Westfield, carrying a 40-pound ballistic shield, entered first. The officers were unclear about the order the rest of the team entered. The entrance door led into a main living area room, and a kitchen was to the officers' left. The room was well lit and there were no visibility problems. One officer described only a slight haze in the air akin to cigarette smoke in a bar. Some officers checked the living room, kitchen, and closets for Escobedo, while others stomped or poured water on a fire that had broken out on the carpet. The fire was a result of the flash bang explosion igniting the propellant of a tear gas canister. (Selvia Dep. 65:14-66:5.)

After determining that no one was in the main room or the kitchen, the officers approached the bedroom door and yelled for Escobedo to surrender. (Selvia Dep. 67:22-5.) When they received no response, someone began using the ram to force the door open. Selvia thought Westfield was using the ram (Selvia Dep. 68:5-12), but Westfield said he was carrying the shield and Lee used the ram on the bedroom door. (Westfield Dep. 81:9-16.) The door did not yield to the ramming blows so Westfield pushed on it with his shield. (Westfield Dep. 81:16-19.) As the officers worked to push the door open, they heard Escobedo yell several times that he had a gun and that it was pointed at his own head, (Westfield Dep. 82:9-10; Brown Dep. 60:14-17), which confirmed for them that Escobedo was in the bedroom.

Eventually the officers were able to get the door slightly open enough so that Straub could throw in a flash bang grenade. (Straub Dep. 55:12-17.) Straub had to lean over Westfield and Lee as they held the door open in order to get the device into the bedroom. (Straub Dep. 56:16-21.) Selvia said he ordered a flash bang thrown into the room but that Westfield threw it. (Selvia Dep. 69:9-12.) The room was "pitch black" when the flash bang was thrown in. (Selvia Dep. 69:10-1.) The flash bang grenade exploded in the front of or just inside the bedroom closet where Escobedo was located, (Straub Dep. 60:7-14; Martin Dep. 119:21-120:7), but the officers did not know that until after the incident ended. (Straub Dep. 60:7-14; Martin Dep. 141:10-13.) The door eventually broke, (Martin Dep. 106:18-19; Selvia Dep. 68:19-22), and the opening was large enough for the officers to get into the bedroom.

Danaher said that the officers disregarded the danger of the flash bang grenades when they threw one into the bedroom for several reasons. (Danaher Affid. ¶ 8.) First, the flash bangs' effect is more severe than the Defendants acknowledge: the sound level at close range "could be actually deafening," (Danaher Affid. ¶ 7), or like "a 747 jet taking off inside an apartment" (*id.*), and the light flash of one million candela "at short distances could be actually blinding" (*id.*). Second, police should place a flash bang grenade in a room rather than throwing it so that it does not "land, ricochet, or roll to an area not intended or desirable." (Danaher Affid. ¶ 6.) Third,

the officers did not sufficiently examine the room before throwing the grenade. (Danaher Affid. ¶ 8.) As a result of these problems, Danaher said the flash bang grenade exploded only a few feet from Escobedo's head. "Escobedo almost certainly could not hear any verbal commands. . . . I consider it probable that Escobedo was temporarily both blind and deaf at the time he was shot." (Danaher Affid. ¶ 9.)

H. Officers in the Bedroom and Fatal Encounter with Escobedo

The record indicates that Westfield, Lee, and Straub entered the bedroom first. Brown said he was last in line, and it is not clear who (either Martin or Selvia) entered the room in the fourth and fifth positions. Once the officers entered, they observed that the door had been barricaded with a large bed frame. (Lee Dep. 114:24-115:3; Martin Dep. 108). The room was strewn with overturned furniture and other items. (Westfield Dep. 82:4-5.) Unlike the main living room of the apartment, the bedroom was dark or dim and visibility was poor. (Lee Dep. 116:18-18; Straub Dep. 59:1-6; Selvia Dep. 69:14-24.)

As the officers entered, Escobedo continued to yell that he had a gun and that it was pointed at his head. (Brown Dep. 60:14-17; Westfield Dep. 83:1-8; Straub 62:15-16). One or more officers were shouting for Escobedo to put the gun down and show his hands to the officers. (Straub Dep. 69:19-22.) Westfield was yelling that he could not see Escobedo. (Westfield

Dep. 85:15-18.) Selvia described it as "there was some screaming. . . . I couldn't make out what was being yelled. I didn't know if it was my own team doing it, at first, or what, or whether it was Mr. Escobedo that was yelling. I just heard yelling. I didn't know where it was coming from." (Selvia Dep. 73: 1-7.)

Westfield, Lee, and Straub moved to their left toward the bathroom because they believed Escobedo was hiding in that room. (Westfield Dep. 83:1-3, 87:10-12.) A mattress had been placed over the bathroom doorway, indicating to Straub that its purpose was to conceal someone hiding directly behind it in the bathroom or further inside the bathroom. (Straub Dep. 61:24-62:9.) Lee thought Escobedo would be in the bathroom because most persons subjected to tear gas move to a source of water to wash their face and obtain wet towels. (Lee Dep. 119:16-22.)

As they approached the bathroom, Straub noticed an open closet that officers had not checked, so he yelled out a warning to the other officers. (Straub Dep. 63:6-17.) The closet was to the right of the bathroom. Straub stood on a chair in an attempt to see into the bathroom as Lee and Westfield approached the door. (Straub Dep. 63:25-64:17.) Lee asked Westfield to raise his shield in order to provide cover for Lee to raise his head and check the bathroom. (Lee Dep. 122:16-20.) At that moment, Lee heard Martin yell out, indicating Martin had found Escobedo. (Lee Dep. 122:22-24.)

Martin had entered the room and moved to the right. Martin believed that he had heard Lee and Westfield shouting for Escobedo to drop his gun. (Martin Dep. 110:10-12.) As Martin entered the room, he believed that "I was going to get shot or the two guys [Westfield and Lee] were going to probably go down the minute we made entry into that room." (Martin Dep. 111:10-12.) Martin thought at the time that Westfield and Lee "had a direct line of sight with that suspect and I just had a horrible feeling that we were going to start getting shot." (Martin Dep. 111:17-19.)

As Martin advanced into the room, he did not expect Escobedo to be in the closet. (Martin Dep. 140:21-24.) When Martin caught sight of Escobedo, he was sitting on the ground with his legs extended in front of him and knees slightly bent. (*Id.* at 113:14-16, 114:23.) Martin said that as he moved to his right, the doorjamb of the closet was no longer between Martin and Escobedo, and Martin quickly had a full view of Escobedo with no cover in between them. (*Id.* at 115:18-8.) Escobedo was pointing his gun upside down at his head with his left hand. (*Id.* at 113:14-16; 115:5-6.) Martin could tell that the hammer on Escobedo's gun had been pulled back. (*Id.* at 119:6-8.)

Martin announced several times that Escobedo was in the closet and that he was pointing a gun at his own head. (*Id.* at 117:19-22.) Martin then ordered Escobedo to drop his gun several times, and Escobedo began to lower his gun "towards me, pointing it at me." (*Id.* at 117:24-118:3; 142:5-12.) At that point,

Martin said he fired because he was in fear of his own life as he was afraid he would be shot or another officer would be shot. (*Id.* at 142:19-143:2.) Escobedo never made any statements to Martin during the encounter. (*Id.* at 142:13-15.)

As Martin was moving toward Escobedo, Brown was behind Martin. When Brown heard Martin's shouts that Escobedo had a gun and Martin's commands that Escobedo drop the gun, Brown saw Martin "take two quick steps backwards" while Martin pointed his gun and flashlight at Escobedo inside the closet. (Brown Dep. 69:6-12.) Brown moved forward, positioning himself to Martin's left with a view of the closet and Escobedo holding the gun to his own head. (Brown Dep. 73:1-7; 75:17-22.) As Selvia heard Martin's commands to Escobedo, he yelled for Brown to fire his Sage weapon at Escobedo. (Selvia Rpt. 1; DE 54-7.) Selvia ordered Brown to fire the Sage weapon at Escboedo in an attempt to disarm him. (Selvia Dep. 78:2-6.) But "[a]bout the time that came out of my mouth, Officer Martin had already started to shoot." (Selvia Dep. 78:7-8.) Selvia described Martin shooting and his own command to Brown as "simultaneous." (Selvia Dep. 78:16.)

According to Brown, "Mr. Escobedo lowered his weapon from his head, pointed it directly in the direction of Brian [Martin]. At that point, I decided to shoot." (Brown Dep. 74:2-4.) Escobedo's left arm was not quite fully extended when he pointed the gun at Martin. (*Id.* at 74:7-75:16.) Brown realized at the time that firing the Sage weapon from such a close

range[4] could be lethal force. (*Id.* at 94:10-13.) Brown said that when he fired, he believed Martin's life was in danger and lethal force was warranted. (*Id.* at 94:6-16.)

Even though both officers decided to fire at the same time, when they saw Escobedo point his gun at Martin, Brown said Martin fired first, (Brown Dep. 76:1-2), probably because the trigger pull on the Sage weapon is long and the weapon is harder to fire than the .9 mm Glock pistol that Martin was using. (Brown Dep. 76:5-14). Martin was unsure of who fired first or whether it was simultaneous. (Martin Dep. 122:18-3.)

Martin thought he was about four to six feet from Escobedo when he aimed at Escobedo's center mass and fired. (Martin Dep. 118:22-24, 121:17.) Martin believed he fired only two or three times but later learned it was more. (Martin Dep. 12-17.) The record does not indicate how many times Martin fired in the first volley.

Brown was also aiming for Escobedo's center mass as he fired the Sage weapon, but the rounds hit one of Escobedo's legs. (Brown Dep. 77:24-78:8.) Brown said he was ten to twelve feet from Escobedo when he fired. (Brown Dep. 92:15) and that he

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[4] The Sage weapon's sighting system had settings for as far away as 100 meters. The closest range setting is 20 meters. (Brown Dep. 91:6-15.) Twenty meters is approximately sixty-five feet.

initially fired two or three times. (Brown Dep. 79:20-21.)

After the initial shots from Martin and Brown, Escobedo dropped the gun between his legs. The gun was partially on the floor and partially on Escobedo's body. (Martin Dep. 144:4-7.) Both officers observed Escobedo reach and/or lean forward in an apparent attempt to pick up the gun again. "To me, it appeared as if he was reaching down for the gun." (Brown Dep. 89:5-6.) Martin said that Escobedo "leaned forward with both hands towards the gun and I felt he was going to pick the gun up and try to shoot." (Martin Dep. 121:20-23.) Straub thought that he heard Martin say something such as "don't," or "stop," in between the volley of shots. (Straub Dep. 69:11-21.)

Martin and Brown then fired a second time. Martin fired a total of nine or ten shots during the entire incident. (Martin Dep. 122:2-3.) Brown fired a total of six times during the entire incident. (Brown Dep. 80:17-18.) Brown thought Escobedo's body moved backward after the second round of shots. (Brown Dep. 88:23-89:2.) Martin believed that Escobedo's upper body slumped far forward after the shooting. (Martin Dep. 136:4-7.)

Martin then moved toward the closet in order to grab Escobedo's gun and put flex cuffs on Escboedo, but as Martin bent down he hit the side of his head against the doorjamb, causing the seal on his gas mask to break and allowing tear gas in. (Martin Dep. 123:10-13; 124:8-11.) Martin grabbed the gun because

he did not know if Escobedo was still alive "and the threat was the gun at that point." (*Id.* at 124:17-20.) Martin carried the gun out of the apartment and the building to the command center. (*Id.* at 124:22-23.) Martin left the scene while holding the gun because the tear gas was affecting him. (*Id.* at 124:9-15, 137:4-5.)

Brown called over the radio for a medic, who was stationed in the hallway. (Brown Dep. 89:19-21; Selvia Dep. 81:13-19.) Escobedo was alive for a short time after the shooting. (Brown Dep. 90:2-3; Lee Dep. 131:7-11.) Lee tried to move Escobedo out of the closet so that medical personnel could check on him, but he was unable to do so until a medic arrived. (Lee Dep. 130:18-22.) Lee ran to the sixth floor to get a stretcher, but when he returned the medic told him that Escobedo was dead. (Lee Dep. 131:19-132:4.) Escobedo was declared dead at the scene at about 8:59 a.m. (Postmortem Rpt. 3; DE 52-6.)

ANALYSIS

The Plaintiff, in her capacity as executrix of the estate of Escobedo, brings this civil rights lawsuit under 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

> deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983. "To state a claim under 42 U.S.C. § 1983, a plaintiff must present facts sufficient to show that the defendants, acting under color of state law, deprived him of a specific right or interest secured by the Constitution or laws of the United States." *Bublitz v. Cottey,* 327 F.3d 485, 488 (7th Cir. 2003).

The Constitutional right at issue in this case is the Fourth Amendment's protection "for the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. There is no dispute that the Defendants were acting under color of state law. The issues are whether a seizure occurred, and if so, whether the force used to effectuate the seizure was reasonable. If the force the Defendants used against Escobedo was excessive, then it violated his Constitutional rights.

A. Seizure

Before undertaking any analysis of the reasonableness of the Defendants' actions, the Court must determine whether, and when, a seizure occurred. This is important because "pre-seizure conduct is not

subject to Fourth Amendment scrutiny." *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992).

The Defendants argue that "Escobedo was not actually seized within the meaning of the Fourth Amendment *until* the point when he was shot." (Defs' Mem. of Law in Support of Mot. for Summ. J. 35; DE 39.) The Plaintiff calls the Defendants' position "outrageous," (Pl. Br. in Opp. to Defs' Mot. for Summ. J. 46; DE 49), and argues that the seizure was from when "police forces surrounded Escobedo's apartment with weapons drawn to the point of Escobedo's death." (*Id.* at 44.)

"A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, by means of physical force or show of authority, terminates or restrains his freedom of movement, through means intentionally applied." *Brendlin v. California*, 127 S. Ct. 2400, 2405 (2007) (quotations and citation omitted). "We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result." *Brower v. County of Inyo*, 489 U.S. 593, 599 (1989). "A police officer may make a seizure by a show of authority and without the use of physical force, but there is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned." *Id.* (citing *California v. Hodari D.*, 499 U.S. 621, 626 n.2 (1991)).

Courts also use the "*Mendenhall* test," derived from *United States v. Mendenhall,* 446 U.S. 544 (1980), which, among other things, made clear that the analysis is objective, not subjective: "We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 554. The Supreme Court then stated:

> Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

Id. In *Brendlin,* the Court said the *Mendenhall* test is only for "[w]hen the actions of the police do not show an unambiguous intent to restrain or when an individual's submission to a show of governmental authority takes the form of passive acquiescence." *Brendlin,* 127 S. Ct. at 2405. The Supreme Court also noted later that the *Mendenhall* test "states a necessary, but not a sufficient, condition for seizure – or, more precisely, for seizure effected through a 'show of authority.'" *Hodari D.,* 499 U.S. at 628. The other condition is that either the suspect is touched by the police, or he yields or submits to the show of authority. *Id.* at 627-29 (holding that the suspect in

that case was not seized during a foot chase but only when police tackled him).

Analysis of the seizure issue "is a highly fact-bound inquiry," *United States v. Tyler*, 512 F.3d 405, 410 (7th Cir. 2008), and courts may use a number of factors:

> whether the encounter took place in a public place or whether police removed the person to another location; whether the police told the person he was not under arrest and was free to leave; whether the police informed the person that he was suspected of a crime or the target of an investigation; whether the person was deprived of identification or other documents without which he could not leave (such as a driver's license or train or airline ticket); and whether there was any limitation of the person's movement such as physical touching, display of a weapon, or other coercive conduct on the part of the police that indicates cooperation is required.

Id. In addition to those factors, the Seventh Circuit has also employed "two overarching themes":

> (1) the nature and degree of the official inducement, and (2) the extent of the restrictions on the citizen's desired freedom of movement. The first of these themes reflects the type of threatening police action . . . and the cost of ignoring the official's demands, while the second informs whether the citizen had reasonable options available to him.

Kernats v. O'Sullivan, 35 F.3d 1171, 1178 (7th Cir. 1994). "In our view, a seizure typically involves an almost complete restriction of movement – either a laying of hands of a close connection (both temporally and spatially) between the show of authority and the compliance." *Id.* at 1180.

While these principles guide the analysis of whether and when a seizure occurred in this case, they are of limited applicability to the facts here. The Supreme Court has not considered the issue of whether a seizure occurred in the context of a police barricade situation. Instead, the seizure issue at the Supreme Court level has involved car chases, road blockades, traffic stops, and face-to-face interactions between police and suspects.

Neither does it appear that the Seventh Circuit has considered the Fourth Amendment seizure issue – or the reasonableness of police force, for that matter – in a case where a person has barricaded himself from the police.[5] A case with similar facts might be

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[5] In *Cabell v. Rousseau*, 130 F. App'x 803, 806 (7th Cir. 2005), the court found that no seizure occurred when a SWAT team, executing an arrest warrant, and the plaintiff exchanged gunfire because no police bullets hit the plaintiff and the plaintiff never submitted to police authority but instead shot at them. That case has such significant factual differences that its finding that there was not a seizure is of little aid to this case. In *Cabell*, police entered the home within seven seconds of the start of the raid, the plaintiff shot at the officers and hit two of them, and the plaintiff surrendered several moments after that. *Id.* at 805.

United States v. Jerez, 108 F.3d 684 (7th Cir. 1997). In that case, two officers repeatedly knocked on a hotel door and window, essentially forcing the occupants to open the door. *Id.* at 691-92. "A reasonable person in their situation could conclude only that the deputies would not leave unless the door was opened." *Id.* at 693. The seizure analysis in that case took its cue from "[t]he second approach articulated by the Supreme Court[,] . . . when the police approach an individual in a confined space such as a bus. In such a situation, it no longer 'makes sense to inquire whether a reasonable person would feel free to continue walking.'" *Id.* at 689 (quoting *Florida v. Bostick*, 501 U.S. 429, 435 (1991)). The rationale for this second approach was:

> Because a person on a bus or in an otherwise confining space "has no desire to leave" and would wish to remain even if police were not present, "the degree to which a *reasonable* person would feel that he or she could leave is *not* an accurate measure of the coercive effect of the encounter." When a person's "freedom of movement [is] restricted by a factor independent of police conduct — i.e., by his being a passenger on a bus . . . , the appropriate inquiry is whether a *reasonable* person would feel free to decline the officers' request or otherwise terminate the encounter."

Id. (citations omitted) (quoting *Bostick*, 501 U.S. at 435-36). The Seventh Circuit made a similar point in *Kernats v. O'Sullivan*, 35 F.3d 1171 (7th Cir. 1994):

> [A]ssume that a group of armed officials, guns drawn, surrounds a citizen in the doorway of her office and threatens to kill her. If that citizen then retreats into her office, locking the door and perhaps barricading it as well, it would be reasonable to conclude that she has been seized although no one laid hands on her. It is enough that as a result of a prominent show of authority she was immediately confined to a small space with no viable means of otherwise terminating the encounter.

Id. at 1180.

The Seventh Circuit used the same approach in another case, *United States v. Adeyeye*, 359 F.3d 457 (7th Cir. 2007), to find that a seizure did not occur. Noting that the factual scenario in *Adeyeye* "contrasts sharply with the *Jerez* conduct," *id.* at 462, the court stated:

> [T]he officers approached the room in the middle of the afternoon. The [officers] knocked only twice, stating at the time of the second knock that they could return later if it was an inconvenient time. Adeyeye acknowledges hearing the officers make that statement. A reasonable person in that position, having been provided the alternative of telling the officers it was an inconvenient time, would have felt free to terminate the encounter.

Id. Also of some help is *Belcher v. Norton*, 497 F.3d 742 (7th Cir. 2007). In that case, a law enforcement

officer refused to let the owners of a vehicle in a towing yard leave (by verbal commands and blocking the exit with his vehicle) and threatened arrest unless they signed over the vehicle's title to the yard owner, which they eventually did. *Id.* at 745-46. "The officer clearly asserted his authority in a way that the plaintiffs reasonably could construe as a declaration that they were not free to leave the tow yard. Such a declaration by a police officer is sufficient to constitute a 'seizure' for purposes of the Fourth Amendment." *Id.* at 748.

The conduct of the Defendants in this case, starting when the ERT took position outside Escobedo's apartment and when numerous uniformed officers stationed themselves around the apartment building, fit the definition of a "seizure" as articulated in *Brendlin*. Members of the Fort Wayne Police Department displayed a show of authority by surrounding Escobedo's apartment and building. The Defendants used a negotiator, members of the ERT, patrol officers, and a mobile command center to take control of the situation. This show of authority would make obvious to a reasonable person inside Escobedo's apartment that he must obey the commands of police, specifically, to come out of the apartment unarmed. Bender and Lucker made clear in their depositions that the Defendants intended to take control of Escobedo. He was not to be left alone in his apartment, and he was not to leave on his own. He could only leave if he was in police custody so that he could undergo a mental health evaluation. A

reasonable person would not have believed he would have been free to terminate the encounter, either by ignoring police communications and commands and simply going about his business inside the apartment (e.g., sleeping, watching television) without further police interaction, or by leaving the apartment and going about his business in the city at large.

The situation here fits several of what the Supreme Court has called the "circumstances that might indicate a seizure, even where the person did not attempt to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). Those are: "the threatening presence of several officers [and] the display of a weapon by an officer." *Id.* A reasonable person would certainly have been threatened by the presence of snipers, armor-clad ERT officers carrying shotguns, pistols, or submachine guns, a mobile command center next to the apartment building, and numerous uniformed officers in the area around the building.

The factors listed in *Tyler*, 512 F.3d at 410, also indicate a seizure took place, even if that case was referring to face-to-face police-suspect encounters. First, while this was not a case where officers could either deal with Escobedo in public or remove him to a more private location (because they did not have the ability to "move" Escobedo anywhere), they did have the power to prevent him from leaving. Second, while the police did not tell Escobedo he was "under arrest," they made clear to him that he must comply with their instructions. It was obvious to Escobedo that he was not free to leave. Third, the police did not

inform Escobedo he was suspected of a crime or the target of an investigation. The fourth factor, involving the deprivation of documents and resulting limits on mobility, is inapplicable. The fifth factor is the most relevant: there was not just "any limitation of the person's movement," *id.*, but an almost complete limit on his movement. Escobedo could not leave or be left to his own accord. There was more than one "display of a weapon," *id.*, as well as "other coercive conduct on the part of police that indicates cooperation is required," *id.*, such as requesting and ordering he surrender, firing tear gas grenades into his apartment, breaching his door, etc. The factors, as presented at the summary judgment stage, weigh in favor of finding that Escobedo was seized long before he was shot.

Application of the "two overarching themes" mentioned in *Kernats,* 35 F.3d at 1178, also indicates that Escobedo was seized. First, "the official inducement" was severe and clear: Escobedo must surrender. This was not a suggestion to speed up his movement, leave a scene, or clear a right-of-way. This was a command, backed by the force of dozens of officers, the ERT, and an armored vehicle. A reasonable person in Escobedo's situation would quickly figure out that "the type of threatening police action," such as the high number of deployed officers, particularly officers from the ERT, indicates that "the cost of ignoring the official's demands" would not be something as minor as a brief detention for a warrant check or a ticket. When that many officers are

deployed, especially officers from a specialized unit, the goal is clear: make the suspect comply with commands, and take custody or control of him. Second, the restrictions on Escobedo's freedom of movement were significant in this case. He was not free to leave the apartment and do as he wished. The police intended to take him into custody for a mental health evaluation. Nor was Escobedo free to be left alone in his apartment. He did not have "reasonable options," such as departing the scene of a traffic stop or a face-to-face encounter with police on the street.

The situation in this case is much more similar to the facts in *Jerez* than in *Adeyeye*. Just as a reasonable person in the place of the two *Jerez* defendants would conclude that the deputies would not leave until the door was opened, 108 F.3d at 693, so too a reasonable person here would conclude that police would not leave until he obeyed their commands to surrender by leaving the apartment unarmed. This was not a situation where a few officers from the Fort Wayne Police Department were making a brief inquiry and offered to return at a more convenient time. *See Adeyeye*, 359 F.3d at 462. Once the Defendants began using Ebetino as a negotiator and deployed the CRT and ERT, they were there to stay. There was no indication that a reasonable person in the circumstances would have observed that there was anything the person could do, other than surrendering as ordered, for the police to end the show of authority and leave.

The scenario here is also similar, though not identical, to the hypothetical seizure in *Kernats*. "A group of armed officials, guns drawn," 35 F.3d at 1180, were surrounding Escobedo's apartment.[6] If a reasonable person retreated further into his apartment and barricaded the entry, as Escobedo did and as the *Kernats* court described, then "it would be reasonable to conclude that [the person] has been seized although no one laid hands on [the person]. *Id.* In this case, "[i]t is enough that as a result of a prominent show of authority," *id.*, a reasonable person in Escobedo's place "was immediately confined to a small space with no viable means of otherwise terminating the encounter." *Id.*

The inability to leave Escobedo's apartment or ignore the commands of police completed the seizure and constituted the required "submission" or "yield" by Escobedo. The court in *Kernats* described a very similar scenario as "enough," 35 F.3d at 1178, to fit the definition of a seizure. Escobedo's inability to leave or be left alone can be characterized as "when an individual's submission to a show of governmental authority takes the form of passive acquiescence." *Brendlin v. California*, 127 S. Ct. 2400, 2405 (2007). In other words, Escobedo yielded or submitted because he was unable to move about as he wished as

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[6] The Court is well aware that one significant difference between this case and the *Kernats* hypothetical is that there is no allegation here that the Defendants "threaten[ed] to kill" the Plaintiff, as the *Kernats* court hypothesized. 35 F.3d at 1180.

a result of the police intentionally applying means (officers, ERT, armored car, tear gas) to restrain his freedom of movement. *See id.*

The conclusion that a seizure occurred in this police barricade situation finds support in the decisions of other circuits[7] that, unlike the Seventh Circuit, have had occasion to consider Fourth Amendment excessive force claims involving barricaded suspects. A Sixth Circuit case, *Ewolski v. City of Brunswick,* 287 F.3d 492 (6th Cir. 2002), stemmed from an incident between police and an armed, paranoid schizophrenic, John M. Lekan. The standoff occurred after police officers went to Lekan's home to

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[7] *See, e.g., Fisher v. City of San Jose,* 509 F.3d 952, 965 (9th Cir. 2007) (suspect was seized "when police surrounded his home and stationed a sharpshooter to watch him" even though he had not yet been formally arrested or taken into custody); *McCracken v. Freed,* 243 F. App'x 702, 708 (3d Cir. 2007) (plaintiff was seized when tactical police team threw pepper spray canisters into the house "with the intent of temporarily debilitating any persons occupying the home" because plaintiff's "freedom of movement was terminated by the pepper spray canisters"); *Phillips v. James,* 422 F.3d 1075 at 1080-83 (10th Cir. 2005) (agreeing with district court's assumption that the "initial seizure" of the armed suspect occurred when officers asked him to come out of his closed bedroom where he was barricaded); *Estate of Smith v. Marasco,* 318 F.3d 497 (3d Cir. 2003) (treating as a seizure the police tactical squad's establishment of a perimeter around a home after officers believed a gun's laser sight was pointed at them); *United States v. Al-Azzawy,* 784 F.2d 890, 893 (9th Cir. 1985) (finding a seizure when "the police had completely surrounded appellee's trailer with their weapons drawn and ordered him through a bullhorn to leave the trailer and drop to his knees").

check on the welfare of Lekan's wife and child; Lekan shot one of the officers during that visit. *Id.* at 497-99. Police deployed the ERT, a hostage negotiator, and eventually an armored vehicle. *Id.* at 498-99. The court found there was a seizure when police surrounded the man's house:

> There can be little question under the circumstances that Mr. Lekan was not free to leave. . . . [A]lthough Mr. Lekan was never in police custody, the police surrounded the house and paraded an armored vehicle in front of the Lekans' house. These actions qualify as an intentional application of physical force and show of authority made with the intent of acquiring physical control. Moreover, this assertion of force and authority succeeded in restraining Mr. Lekan's liberty to leave his home.

Id. at 506. The court[8] specifically rejected the district court's conclusion that no seizure occurred, a conclusion based on the theory that because Lekan barricaded himself in his home, he never submitted to authority. *Id.* While this decision and the others in footnote seven are of course not binding on this Court, they provide persuasive authority and generally

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[8] The Sixth Circuit later relied on *Ewolski* to find there was a seizure during another police-suspect barricade situation: "By laying siege to Bing's house, breaking his door and windows, and employing pepper gas, the police accomplished a de facto house arrest, i.e., a Fourth Amendment seizure." *Estate of Bing v. City of Whitehall*, 456 F.3d 555, 564 (6th Cir. 2006).

accord with the Seventh Circuit's approach in *Jerez* and *Kernats*.

Because the Court has determined that the Defendants seized Escobedo,[9] the Court now turns to the more difficult analysis of whether the manner in which he was seized, through the applications of force, was reasonable or excessive.

B. Excessive Force

A plaintiff may bring a § 1983 suit against individual officers in either their official or individual capacity or both. In this case, the Plaintiff is suing the Defendants in their individual capacities. In order to establish such a claim under § 1983, the Plaintiff must show that the Defendants were personally involved in depriving him of his constitutional rights. *See Walker v. Taylorville Corr. Ctr.*, 129 F.3d 410, 413 (7th Cir. 1997); *Gossmeyer v. McDonald*, 128 F.3d 481, 494 (7th Cir. 1997) (quoting *Black v. Lane*, 22 F.3d 1395, 1401 (7th Cir. 1994)).

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[9] The Court could also find that a seizure occurred when Martin and the other officers fired the tear gas into Escobedo's apartment. At that point, a reasonable person would not "feel free to decline the officers' request," *Jerez*, 108 F.3d at 689, backed up by tear gas, or "means of physical force . . . intentionally applied," *Brendlin*, 127 S. Ct at 2405, to leave the apartment. The inducement to obey police at this point is significant, and the extent of restriction on a person's freedom of movement would be severe in light of the effect of the tear gas. *Kernats*, 35 F.3d at 1178.

In cases involving arrest, investigatory stop, or other "seizure" of a free citizen, the "objective reasonableness" standard of the Fourth Amendment applies. *Wilson v. Williams,* 83 F.3d 870, 874 (7th Cir. 1996) (citing *Graham v. Connor,* 490 U.S. 386, 395 (1989)).

> The Fourth Amendment protects against unreasonable seizures, not seizures that "shock the conscience" or cause "severe injuries." If, under the totality of circumstances, a police officer unreasonably seizes a person by using excessive force, he has violated that person's Fourth Amendment rights. The objectively unreasonable seizure itself (regardless of the officer's motive or whether any injury inflicted was severe) crosses the constitutional threshold.

Lester v. City of Chi., 830 F.2d 706, 712 (7th Cir. 1987); *see also Graham,* 490 U.S. at 397 ("The reasonableness inquiry is an objective one. The question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."). To decide whether the amount of force used was excessive, the court must "examine the totality of the circumstances to determine whether the intrusion on the citizen's Fourth Amendment interests was justified by the countervailing government interests at stake." *Jacobs v. City of Chi.,* 215 F.3d 758, 773 (7th Cir. 2000).

Relevant considerations include "the severity of the crime at issue, whether the suspect poses an

immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Graham,* 490 U.S. at 396. Mental illness may also be considered as a relevant factor. *Sallenger v. Oakes,* 473 F.3d 731, 739 (7th Cir. 2007). Of course, the "calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Graham,* 490 U.S. at 396-97. Thus, courts must examine the reasonableness of the actions "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396.

Law enforcement officers are entitled to a defense of qualified immunity in actions against them founded upon the United States Constitution or federal law. A police officer will be entitled to immunity when a reasonable police officer could have believed that his conduct was constitutional in light of clearly established law and the information he possessed at the time. *Anderson v. Creighton,* 483 U.S. 635, 639 (1987); *Frazell v. E.K. Flanigan,* 102 F.3d 877, 886 (7th Cir. 1996).

> The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the

> relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

Saucier v. Katz, 533 U.S. 194, 205 (2001). "The police cannot have the specter of a § 1983 suit hanging over their heads . . . as long as their behavior falls within objectively reasonable limits." *Clash v. Beatty,* 77 F.3d 1045, 1048 (7th Cir. 1996). "Although the privilege of qualified immunity is a defense, the plaintiff carries the burden of defeating it." *See Mannoia v. Farrow,* 476 F.3d 453, 457 (7th Cir. 2007).

Under United States Supreme Court precedent, the analysis of a qualified immunity defense requires a two-step inquiry. First, a court must answer the threshold question whether the alleged facts, taken in the light most favorable to the party asserting the injury, show that the officer's conduct violated a constitutional right. *Saucier,* 533 U.S. at 201. Second, assuming that a plaintiff is able to establish a constitutional violation under a favorable view of the facts, "the next, sequential step is to ask whether the right was clearly established." *Id.* In other words, a court must consider whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case. *Id.*

> To be clearly established, the right in question must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Miller v. Jones, 444 F.3d 929, 934 (7th Cir. 2006) (quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)). This inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier,* 533 U.S. at 201.

"For a right to be clearly established, however, we need not have a prior case that is founded on materially similar facts; officials may still be on notice in 'novel factual circumstances.'" *Miller v. Jones,* 444 F.3d at 934 (quoting *Hope v. Pelzer,* 536 U.S. 730, 741 (2002)); *McDonald v. Haskins,* 966 F.2d 292, 295 (7th Cir. 1992) ("It would create perverse incentives indeed if a qualified immunity defense could succeed against those types of claims that have not previously arisen because the behavior alleged is so egregious that no like case is on the books."); *see also Siebert v. Severino,* 256 F.3d 648, 654-55 (7th Cir. 2001) (identifying two routes for proving that a right is clearly established: (1) the violation is so obvious that a reasonable officer would know that what he was doing violates the Constitution, or (2) a closely

analogous case establishes that the conduct is unconstitutional).

The ultimate inquiry is whether the state of the law on July 19, 2005, gave the Defendants fair warning that their treatment of Escobedo was unconstitutional. *Hope*, 536 U.S. at 741.

1. *Firing Tear Gas Into Escobedo's Apartment*

The first point when the Defendants began using force against Escobedo during their seizure was when Martin and two other officers,[10] stationed in the street, fired tear gas canisters through the windows of Escobedo's apartment upon the orders of the supervising officers.[11]

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[10] The other two officers, Davis and Barrientes, who also fired tear gas canisters into the apartment at the same time as Martin are not defendants in this case. The Plaintiff stated in its Response to the summary judgment motion that her excessive force claim for use of chemical agents is also made against the members of the entry team – Martin, Brown, Selvia, and Straub – as well as the supervisory officers. This section only analyzes Martin's use of chemical agents by firing tear gas canisters through the apartment windows.

[11] The Court analyzes any supervisor liability for this use of force in C.1.(a), *infra*.

(a) *Did Firing Tear Gas into the Apartment Violate Escobedo's Constitutional Rights?*

To determine whether the use of tear gas was excessive force, the Court looks to the *Graham* factors. The first *Graham* factor is the severity of the crime. Police only went to Escobedo's apartment because Escobedo himself called 911 for help. The Defendants acknowledge that their intent was not to arrest Escobedo for committing a crime but to take him into custody in order to prevent him from hurting himself and to obtain a mental health evaluation for him. The only crime an officer could have suspected Escobedo of having committed at that point was possession of cocaine since Escobedo had admitted during the 911 call that he had recently used cocaine. Even though police knew Escobedo had a gun, there is nothing in the record to indicate that officers believed he was a felon in possession of a firearm.

The second *Graham* factor – whether Escobedo posed an immediate threat to the safety of the officers or others – is the subject of much dispute. Instead of evaluating whether Escobedo posed a threat, the issue is better framed as whether a reasonable officer at the time would have thought Escobedo posed an immediate threat to officers or the public.

The Defendants, among themselves, do not have the same opinion about the level of threat Escobedo posed. Ebetino said Escobedo did not make any threats (other than perhaps the one statement that he would exit the apartment with the gun in his

hand). On the other hand, Zelt believed that Escobedo posed a deadly threat throughout the entire incident because Escobedo could have started shooting at officers or the public. However, Zelt indicated that his assessment was based on reviewing the 911 transcript and some of Escobedo's comments to Ebetino, both of which were not available to Zelt during the incident. Hunter testified that he did not assess whether Escobedo was a threat and based his concurrence with the tactical plan on other considerations, but he also wrote in a report after the incident that the threat to the area was a factor in his concurrence.

An objective analysis of the situation from the perspective of a reasonable police officer, as called for by *Graham,* leads to the conclusion that Escobedo did not pose an *immediate* threat to police or the public that justified shooting tear gas canisters through his apartment windows. Escobedo certainly posed *some* level of threat or potential threat because he was armed, suicidal, under the influence of drugs and alcohol, and perhaps suffering from a mental illness. But there is nothing in the record that indicates he posed an immediate threat, that is, he was taking action that could at any moment harm police or the public. For example, he did not wave his gun out the window (or even open or come near the windows), point his gun at officers or the public, fire his gun inside his apartment (which might injure others if the bullet penetrated the walls, floor, or ceiling), or even state that he would shoot officers or members of the

public. Another indication that he was not an immediate threat was the close proximity of Ebetino during the negotiations. After taking over negotations from Taylor, Ebetino, if he believed there was an immediate threat, would have moved to a more distant and safe location from his spot just down the hallway from Escobedo's door. A reasonable officer reviewing the past several hours of the incident at 8:30 a.m. would take note of Ebetino's conduct as well as the lack of overt threats in words or action by Escobedo and conclude that Escobedo did not pose an immediate threat to police or the public.

The third *Graham* factor does not lend itself to the Defendant's position. Flight was not a factor given that Escobedo was barricaded inside his own apartment and surrounded by several dozen well-armed police officers. As to whether Escobedo was actively resisting arrest, it must be observed that police were not trying to effectuate an arrest in the traditional sense, even if taking him into custody for a mental health evaluation is a seizure for Fourth Amendment purposes. Escobedo's conduct of staying inside his apartment is not the sort of behavior usually associated with actively resisting arrest in excessive force cases, such as grappling and fighting with an officer, *see, e.g., Tom v. Voida,* 963 F.2d 952 (7th Cir. 1992) (stronger suspect hit officer's head many times and beat her severely before being shot), *Henning v. O'Leary,* 477 F.3d 492 (7th Cir. 2007) (suspect reached for officer's loose gun during intense scuffle with several officers). Escobedo's behavior did

not present the tense, rapidly evolving circumstances present with suspects who can physically engage with officers.

In light of these considerations, the Court must decide whether the governmental interest justified the intrusion on Escobedo's rights. In the beginning, the governmental interest was to persuade Escobedo to surrender peacefully and not harm himself. Unlike many other police standoff cases, the government here did not have to contend with a wounded or unwounded hostage, someone with a demonstrated history of violence, or a person who has tried (or even threatened) to harm police or the public. On the other hand, the police did face the challenge of communicating with a distraught person who was under the influence of drugs and alcohol, perhaps suffering from mental illness, and whose statements were often nonsensical and/or contradictory.

As time went on, the Defendants, mainly Bender as the commander of the scene, claim that other governmental interests came into consideration and warranted the entire spectrum of the use of force police used in their attempt to formally take Escobedo into custody. These interests were controlling the general area around the incident, particularly people walking to nearby residences and businesses; the effect of street blockades on traffic flow, especially during peak traffic times; and the potential threat to and safety of persons walking near the apartment building, including in and out of nearby St. Joseph Hospital. Affecting these interests were the

deteriorating readiness of tactical officers and the Defendants' view that negotiations were not working.

There are genuine issues of material fact surrounding these factors that preclude the Court from finding that firing tear gas into the apartment at 8:30 a.m. was reasonable. There are also genuine issues of material fact whether, in light of the governmental interests, a reasonable officer would have considered the same or different factors, and done so in a different way, than did the Defendants. For example, it is not clear from the record whether a reasonable officer would have had the same concern about the potential threat Escobedo posed to pedestrians near the building and persons at St. Joseph Hospital. Also, given that the supervisors were not getting all important information about negotiations, it is not clear if a reasonable officer in their position would have concluded that further negotiations were futile and then decided to use force.

The most important of these claimed interests is the issue of the threat or potential threat posed by Escobedo. The Defendants have not cited to any evidence in the record to support the view that Escobedo became more dangerous or threatening as time went on such that police could conclude that the use of force in the form of tear gas suddenly became necessary. Escobedo's comments throughout the incident were a mix of pleas for help, threats of committing suicide, statements indicating he might surrender, and statements that he feared the police. These comments came in a constantly changing mix

starting from the 911 call until police ended negotiations. His behavior, too, alternated between better and worse. Ebetino at times heard noises indicating Escobedo was barricading his apartment, but at other times there were noises and comments indicating that Escobedo was removing barricade items. The Defendants have not pointed to any change in comments or behavior near the end of negotiations that precipitated the need to use force.

Escobedo never threatened to shoot at officers or civilians walking on the street below or at other buildings. For all the concern about the threat to the hospital, it is not clear from the record whether Escobedo had a clear line of fire from his window to the hospital. Additionally, the Defendants were unable to establish that they ordered or warned the hospital to shut down or take other protective action, such as moving patients and employees away from windows that faced Escobedo's apartment building.

The reasonableness of firing tear gas munitions into the apartment in order to accomplish the government's interest in getting Escobedo to surrender is further brought into question by the fact that police cut off communication with Escobedo, which made making arrangements to surrender difficult to impossible. Tear gas in general, and particularly at the levels used by the Defendants at this point, make it difficult to speak, as Zelt acknowledged and as Martin experienced later when his mask seal broke. Also, Ebetino was ordered to end his phone conversation with Escobedo as Martin and

the others were about to fire the tear gas. Then, Ebetino and other members of the CRT did not take the communication equipment with them when they left the seventh floor. Even though members of the CRT knew when tear gas was going to be used, no one from CRT or ERT obtained gas masks for members of the CRT so they could stay and then reestablish communication despite the fact that nothing occurred to rush the deployment of the gas. Neither did the CRT officers take steps to maintain or reestablish communication once they were away from the tear gas. And since nothing in the record indicates that Ebetino told Escobedo that the police switched phones so Escobedo could call back if the call was terminated, Escobedo had no way of reestablishing contact once Ebetino hung up the phone as gas was being deployed into the apartment. Yet the evidence does suggest that Escobedo did try to reestablish contact with Ebetino: Escobedo called Taylor's cellular phone number, which is the only number he had for the police, several times after police fired the tear gas and began the breach of his apartment.

The Defendants have not offered evidence showing how they were having trouble maintaining the outer perimeter of the scene other than a comment by Bender that some unspecified number of people were getting through. There is no indication of how many people were breaching or trying to breach the perimeter, whether they were putting themselves or others in danger, or what kind of danger there actually was for people getting through the perimeter.

There also is no evidence that officers' readiness was deteriorating to the point where police had to act at 8:30 a.m. or any police action after that point would be unsafe. Officers had been at the scene for three hours at most, and there is no evidence about the temperature outside or in the seventh floor hallway at 8:30 a.m. Crouching in an unairconditioned seventh-floor hallway and sitting or standing at the mobile command center may not have been comfortable, but there is no record that officers readiness was actually deteriorating.

There is also a genuine issue of material fact about whether this incident was having an effect on peak traffic flow in the downtown area for two reasons. First, the Defendants are not in complete agreement about this interest. Bender said traffic was increasing, but Zelt said that many if not most people who work downtown had arrived by 8:30 a.m. Second, the Plaintiff's expert, Danaher, stated that he is familiar with downtown traffic patterns and that "traffic in this small city could with minimal hassle and inconvenience be re-routed to allow traffic flow to [be] only slightly restricted by the ongoing situation." (Danaher Affid. ¶ 32.)

Even if the decision to use tear gas at that time or at all was appropriate because of the interests at stake, there is an issue regarding the amount of gas deployed. Danaher said the amount of tear gas was excessive and "the result of an overly tactical approach" that did not fully use the element of time to the advantage of police. The Defendants –

including Zelt, who calculated the amount of gas – did not explain why a level of gas twelve times beyond incapacitation level was needed, and the Defendants' expert did not address the claim that the amount of gas was more than necessary.

The issues of fact surrounding the government's interests preclude summary judgment for the Defendants on the claim that the use of tear gas at 8:30 a.m. against a thus-far peaceful but suicidal, armed, barricaded person was excessive.

(b) *Qualified Immunity and Clearly Established Right*

Viewing the facts most favorable to the Plaintiff, Escobedo was not posing a threat to officers or the public, the standoff was only three hours old, and the officers making tactical decisions did not have all the relevant information regarding negotiations. A reasonable officer in Martin's position would have known that, under the Plaintiff's version of events, firing the tear gas rounds into the apartment was an excessive use of force.

A number of sufficiently closely analogous cases, including three cases cited by the Plaintiff, have found the use of chemical agents such as tear gas or mace violates the rights of non-threatening, non-resisting persons such that the unlawfulness of firing tear gas canisters into Escobedo's apartment should have been apparent in light of preexisting law. *See Estate of Smith v. Marasco,* 430 F.3d 140, 151-53 (3d

Cir. 2005) (it was unreasonable for officers to decide to storm suspect's house using tear gas and flash bang grenades); *Knighten v. John,* 180 F.3d 264, *2 (5th Cir. 1999) (per curiam) (alleging that prison guards used tear gas without cause stated a claim of a constitutional violation); *Estate of Bryant v. Buchanan,* 883 F. Supp. 1222, 1227 (S.D. Ind. 1995) (a jury could find that spraying CS gas into the face of a shackled and handcuffed suspect, along with other force, was "patently violative of the Fourth Amendment," leading the court to deny the defendant officers qualified immunity.); *Lamb v. City of Decatur,* 947 F. Supp. 1261, 1264 (C.D. Ill 1996) (police denied qualified immunity because it was not necessary to spray protesters with tear gas); *Adams v. Metiva,* 31 F.3d 375, 387 (6th Cir. 1994) (reversing summary judgment because a jury could find that officer sprayed mace into the face of a handcuffed person and "no reasonable officer would believe that such conduct would not violate plaintiff's constitutional rights); *Slakan v. Porter,* 737 F.2d 368, 372 (4th Cir. 1984) (prison guards' use of tear gas and other weapons against a prisoner "unquestionably crossed the line separating the necessary force from brutality"); *McCargo v. Mister,* 462 F.Supp 813, 820 (D.Md. 1978) (spraying tear gas into prisoners' cells was unreasonable and violated prisoners' rights); *Greear v. Loving,* 528 F.2d 578 (4th Cir. 1976) (reversing summary judgment because a jury might find that prison authorities unnecessarily fired tear gas into prisoner's face); *Morris. v. Travisono,* 528 F.2d 856 (1st Cir. 1976) (affirming summary

judgment ruling for plaintiff prisoners who claimed prison guards gassed them when they posed no threat).

The defendant argues that most of the cases cited by the Plaintiff – including the three cited above, *McCargo, Greear,* and *Morris* – are prison cases and thus distinguishable from this case. Some of the other cited cases above also are prison cases. But that is a distinction without a difference. To find that a right has been clearly established, a court does not have to find "the very action in question has previously been held unlawful." *Miller v. Jones,* 444 F.3d 929, 934 (7th Cir. 2006). It is no surprise that, given the novelty of this case – a standoff that leads to a tactical assault on a person's apartment despite the lack of a hostage, shots fired, threats to police or the public, or some other immediate threat – no very similar case could be found where using tear gas was considered a violation of a person's rights.

The principle underlying the holding in all of the cases cited above is what clearly establishes Escobedo's right not to be subjected to tear gas. Under the circumstances most favorable to the Plaintiff, Martin and the commanders should have known that firing the tear gas against a person who is not resisting, fleeing, or posing an immediate threat to police or others would violate Escobedo's rights. That principle applies whether the person refuses police commands to leave his house (*Marasco*), is an unruly protester (*Lamb*), is

handcuffed in the back of a police car (*Adams*), or is in a prison cell (a number of the others cited above).

The Court recognizes that excessive force claims by prisoners fall under the Eighth Amendment, not the Fourth Amendment, and as such the analysis of such claims differs. But the courts' findings that prison authorities used excessive force and violated prisoners' constitutional rights with tear gas in those cases still qualifies as preexisting law that sheds light on what happened on July 19, 2005. Also, the fact that courts have found prison authorities to have violated prisoners' rights with tear gas favors the Plaintiff's position, not the Defendants'. Because of the need to maintain order in a prison, first, authorities have more latitude and discretion to use force than do the police when dealing with a person inside his own home (who, in this case, is not even sought for having committed a crime), and second, prisoners have fewer privacy rights than a person inside his own home. *See generally Soto v. Dickey*, 744 F.2d 1260, 1268-69 (7th Cir. 1984) (stating that federal courts have "adopted a broad hands-off attitude toward problems of prison administration," and administrators have "Herculean obstacles to effective discharge of . . . duties" such as "maintaining internal order and discipline, . . . securing their institutions against unauthorized access or escape, and . . . rehabilitating . . . the inmates"); *Bell v. Wolfish*, 441 U.S. 520, 537, 557 (1979) (stating that prisoners have less privacy, and it is "of a diminished scope"). Accordingly, Martin is not entitled to

qualified immunity for shooting tear gas into Escobedo's apartment.

2. *Breach of and Entry into Escobedo's Apartment by Means of Flash Bang Grenades and More Tear Gas*

The next use of force by the Defendants is their breach of and entry into Escobedo's apartment and bedroom, including the use of flash bang grenades and additional tear gas. The Defendants involved in this use of force are the entry team[12]: Selvia, its leader, and Martin, Brown, and Straub.[13]

At this point during the incident, the *Graham* considerations are similar to when Martin and others fired the tear gas into Escobedo's apartment. The first factor, the severity of the crime, did not change at this point. Police received no response from Escobedo in word or deed after the tear gas was fired into the apartment (other than perhaps hearing coughing).

As for the second *Graham* consideration, any immediate threat to the officers, that too had not changed. Escobedo had done nothing to indicate that the potential threat he posed had increased, such as firing his weapon in retaliation for the tear gas in his

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[12] The entry team also included Westfield and Lee, but they were dismissed from the case earlier in this litigation at the request of the Plaintiff. *See* DE 34, 40.

[13] The Court analyzes any supervisor liability for use of force in C.1.(a), *infra*.

apartment. And because police were no longer communicating with him, the Defendants had no basis to believe that he was a greater danger to himself or others. Thus, the factual evidence in the record does not establish that Escobedo posed an immediate threat to the officers or the public at this point.

The third factor, resistance or flight, has little or no difference at this point. The only possible difference is that a reasonable officer might have viewed Escobedo as showing more resistance at this point in light of the fact that he had not exited the apartment after the initial tear gas deployment, as the Defendants' expert remarked when he referred to "the intransigence of the suspect." (McCarthy Rpt. 10, DE 37-32.) On the other hand, a reasonable officer might also believe that Escobedo had become even more frightened of the police after they shot tear gas into his apartment and, as a result, was hiding; that the significant amount of tear gas made it difficult or impossible for Escobedo to communicate with police in order to arrange his safe and peaceful surrender; or that the tear gas had so incapacitated and/or disoriented Escobedo that he was unable to do anything, including move toward the officers and surrendering. In any event, the Defendants did not offer any evidence in the record to support a finding that Escobedo had significantly increased the level of his resistance at this time. In fact, it appeared that Escobedo was maintaining the status quo.

In light of these considerations, the governmental interest at this point was no different than it was before police decided to use force in the first place in the form of tear gas . The interest remained to make Escobedo surrender and to protect officers from any potential harm during the process. The factors affected by the lapse of time had not changed at this point because only a few minutes had passed from when tear gas was shot through the windows to the point when police rammed open his apartment door and threw in more tear gas canisters. The other governmental interests – controlling the area, the effect on traffic, deteriorating readiness of officers, the potential threat to pedestrians – have the same problems at this point as they did when police decided to shoot tear gas through the apartment windows. The governmental interests were not served by entering the apartment and bedroom with more tear gas and flash bang grenades. The Defendants did not have to escalate to this next level of force; waiting for a peaceful surrender was still an option. Instead, the Defendants elected to use force: entering the apartment and the bedroom while deploying more tear gas as well as flash bang grenades. In light of the issues of fact surrounding the governmental interests, a jury could find that this level of intrusion was unreasonable and constituted excessive force, violating Escobedo's rights.

All the Defendants on the entry team were personally involved with and responsible for this use of force. Selvia, Martin, Brown, and Straub are not

entitled to qualified immunity for this violation of Escobedo's rights for the same reason Martin was not entitled to qualified immunity for firing tear gas into the apartment windows. In short, the law was clearly established at that time to put them on notice that unnecessarily entering Escobedo's apartment and bedroom along with the use of more tear gas and flash bang grenades would have, under the Plaintiff's version of events, violated Escobedo's rights.

The Plaintiff in her Response brief also makes reference to a claim against Ebetino for an unreasonable assault on the apartment. This apparently is based on a failure to intervene claim.[14]

> An officer who is present and fails to intervene to prevent other law enforcement officers from infringing the constitutional rights of citizens is liable under § 1983 if that officer had reason to know: (1) that excessive force was being used, (2) that a citizen has been unjustifiably arrested, or (3) that any constitutional violation has been committed by a law enforcement official; and the officer had a realistic opportunity to

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[14] An excessive force claim against Ebetino would fail given that the Plaintiff does not allege Ebetino personally participated in the entry into the apartment and bedroom or in any other use of force against Escobedo. A supervisory liability claim would also fail because the record establishes that Ebetino did not hold a supervisory position such that he had any authority that would subject him to liability under *Chavez v. Illinois State Police*, 251 F.3d 612, 615 (7th Cir. 2001), *see infra* C.1

> intervene to prevent the harm from occurring.

Yang v. Hardin, 37 F.3d 282, 285 (7th Cir. 1994). Assuming for the moment that Ebetino knew that excessive force was being used when tear gas was fired into the apartment and when the entry team raided the apartment, the facts in the record show that Ebetino did not have the availability of a reasonable amount of time to intervene or a reasonable likelihood of successful intervention. Ebetino was negotiating with Escobedo up until the last minute and focusing his attention on efforts to coax Escobedo into surrendering. Once tear gas was fired into the apartment, Ebetino was overwhelmed by the tear gas and had to flee the seventh floor. By the time Ebetino reached the command center, it would not have been possible for him to return to the seventh floor and somehow stop the entry team from raiding the apartment. Also, given Escobedo's rank as an officer, it is unlikely that his efforts to stop the tear gas or the raid would have been heeded by other officers and higher-ranking personnel.

3. *Escobedo's Fatal Encounter with Martin and Brown*

Once Martin and Brown were inside the bedroom and came face to face with Escobedo in the apartment, the circumstances and *Graham* considerations changed dramatically. There is no factual dispute that Escobedo pointed his gun at Martin. Martin's and Brown's accounts of that act are consistent. The

Plaintiff's only contention about what happened at this moment is the claim that Escobedo perhaps could not hear or see the officers, so pointing the gun at Martin was possibly inadvertent.

First, the severity of the crime changed from cocaine possession to threatening an officer with a deadly weapon. Second, Escobedo at this point finally did pose an immediate threat to a police officer. Third, moving the gun from his own head and pointing it at Martin constitutes actively resisting arrest because it prevented Martin or other officers from stepping close enough to physically secure Escobedo and take him into custody.

These *Graham* factors make clear that the governmental interest at this point is officer safety, that is, preventing Escobedo from moving his finger on the trigger enough to fire one or more bullets toward Martin. "[I]f a suspect threatens the officer with a weapon . . . deadly force may be used if necessary." *Tennessee v. Garner,* 471 U.S. 1, 11 (1964). "Where the suspect poses no immediate threat to the officer and no threat to others," deadly force is not justified. *Id.* "When an officer believes that a suspect's actions places him, his partner, or those in the immediate vicinity in imminent danger of death or serious bodily injury, the officer can reasonably exercise the use of deadly force." *Sherrod v. Brown,* 856 F.2d 802, 805 (7th Cir. 1988) (en banc) (emphasis omitted). Furthermore, "we have held that if the suspect threatens the officer with a weapon, the risk of serious physical harm to the officer or others has

been established." *Palma v. Edwards,* 103 F. App'x 3, *5 (7th Cir. 2004).

This principle has been applied in the Seventh Circuit many times to vindicate officers facing mortal peril as Martin was here. *See, e.g., Maravilla v. United States,* 60 F.3d 1230, 1233 (7th Cir. 2005) (fatally shooting a man who was firing out of a window during an arrest warrant raid was justified by fear of serious harm to officers inside the house and to officers outside the house). The Seventh Circuit has even found that deadly force was justified against a threatening person in situations where the person did not point a gun at the officer, as was the case here.[15] Also, it does matter whether Escobedo

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[15] *Henning v. O'Leary,* 477 f3d 492, 496 (7th Cir. 2007) (deadly force justified against a suspect whose hands at least two officers thought were on or near a loose gun during a struggle); *DeLuna v. City of Rockford, Ill.,* 447 F.3d 1008, 1011-13 (7th Cir. 2006) (fatally shooting person was reasonable when he advanced on officer in a way that prevented the officer from seeing one of his hands despite warnings to stop, said he "had something for" the officer and that the officer would have to shoot him in the chest if he was going to shoot, had a history of violence, was known to carry weapons, and was acting irrationally); *Plakas v. Drinski,* 19 F.3d 1143,1146 (7th Cir. 1994) (fatal shooting was justified when suspect had escaped from a police car, attacked a police officer with a fireplace poker, refused commands to drop his weapon; told officer that one of the two of them would die that night, and advanced on officer with the weapon raised to strike); *Tom v. Voida,* 963 F.2d 952, 962 (7th Cir. 1992) (officer's fatal shooting of suspect was justified because suspect had already severely beaten the officer, she could not subdue suspect by other means, and he was rushing her again even after she fired once); *Ford v. Childers,*

(Continued on following page)

intended to harm or threaten Martin when he pointed the gun at the officer, or if Escobedo could not hear or see Martin and simply moved the gun in Martin's direction without knowing Martin was there, as the Plaintiff suggested. The reasonableness analysis required by *Graham* is an objective one. A reasonable officer would not be able to make such a split-second determination in those conditions and would be justified in using deadly force in self-defense or defense of others.

Accordingly, Martin's initial volley of shots at Escobedo was reasonable and justified and did not violate Escobedo's rights because Martin was defending himself from Escobedo's threatening actions, conduct that put Martin in imminent danger of death or bodily injury. Brown's shooting of Escobedo also was reasonable and justified and did not violate Escobedo's rights because Brown was defending Martin from this same conduct that put Martin in imminent danger of death or bodily injury.[16]

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855 F.2d 1271, 1275-76 (7th Cir. 1988) (en banc) (police officer was justified in shooting fleeing bank robber because he reasonably believed the robber was armed and posed a danger of serious harm to others).

[16] The Court does not need to decide if Brown used lethal or less-than-lethal force when he fired the beanbag rounds from the Sage weapon because Brown admitted that, at the range he fired the weapon, it was lethal force. If firing the weapon was considered less-than-lethal force, it would be justified and reasonable in light of the conclusion that lethal force at the moment was justified.

The second volley of shots by both Martin and Brown did not violate Escobedo's rights either. "Police officers cannot be expected to wait until a resisting arrestee has a firm grip on a deadly weapon . . . before taking action to ensure their safety." *Henning*, 477 F.3d at 496. *See also Muhammed v. City of Chi.*, 316 F.3d 680, 683 (7th Cir. 2002) (summary judgment for officer's second round of shooting suspect was appropriate when there was nothing to contradict officer's statement). Escobedo's gun dropped into this lap or between his legs, and Martin observed what he believed was Escobedo reaching down and leaning forward to pick up the gun. Brown too said it looked like Escobedo was reaching for the gun. There is no factual dispute about these observations. It was reasonable at this point for Martin and Brown to believe that Escobedo was trying to pick up the gun so he could point it at Martin or Brown and fire it. Accordingly, both Martin's and Brown's second volley of shots were reasonable and justified.[17]

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[17] Insofar as there was any supervisory liability claim against Selvia under *Chavez v. Illinois State Police*, 251 F.3d 612, 615 (7th Cir. 2001) for ordering Brown (or Martin) to fire, such a claim would also be dismissed in light of the conclusions that lethal force was justified and there was no underlying constitutional violation in shooting Escobedo.

C. Other Claims

1. *Liability of Supervisory Officers*

The Plaintiff argues that the supervisory officers – Bender, Zelt, Hunter, and Lucker – also are liable for the violations of Escobedo's rights. The Plaintiff discusses two forms of liability that can be read from her complaint: first, general supervisory liability for their direct orders to use force against Escobedo, (DE 49 at 69), and second, liability for failure to train the subordinate officers to handle situations involving suicidal, mentally ill persons (DE 49 at 69).

(a) *Supervisory Liability*

The Plaintiff argues that Hunter, Zelt, Bender, and Lucker – when they conferred with each other and then ordered the tear gas assault and subsequent raid on the apartment – through their acts and omissions displayed a reckless or callous indifference to Escobedo's constitutional rights, and, in fact, caused their subordinates to violate his rights. The Defendants argue that the decisions and actions of the supervisors were reasonable under the circumstances.

"Section 1983 creates a cause of action based upon person liability and predicated on fault." *Wolf-Lillie v. Sonquist,* 699 F.2d 864, 869 (7th Cir. 1983). An individual can only be held liable if he "caused or participated in an alleged constitutional deprivation." *Id.* Accordingly, courts have rejected § 1983 claims attempting to hold a supervisor liable for the conduct

of a subordinate on the basis of *respondeat superior*. *Id.*

> Supervisory liability will be found, however, if the supervisor, with knowledge of the subordinate's conduct, approves of the conduct and the basis for it. That is, to be liable for the conduct of subordinates, a supervisor must be personally involved in that conduct. Supervisors who are merely negligent in failing to detect and prevent subordinates' misconduct are not liable. . . . The supervisors must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see. They must in other words act either knowingly or with deliberate, reckless indifference.

Chavez v. Ill. State Police, 251 F.3d 612, 651 (7th Cir. 2001) (citations, quotation marks, and brackets omitted) (ellipsis in original). "A causal connection, or an affirmative link, between the misconduct complained of and the official sued is necessary." *Wolf-Lillie,* 699 F.2d at 869.

Here, the Plaintiffs have presented sufficient evidence to present to a jury that Bender, Zelt, Hunter, and Lucker directed, approved, or condoned the conduct that caused a constitutional violation, or, at the very least, that it occurred with their knowledge or consent. This is not a case where the supervisors are merely charged with being negligent in discovering their subordinates' actions. They personally took part in the events of July 19, 2005.

Bender made the final decision to use force against Escobedo, first by firing tear gas into the apartment, and second by sending the entry team into the apartment. Zelt proposed the specific course of action, concurred with Bender's decision, and also gave specific orders to the ERT and entry team throughout the standoff. Even though Hunter supervised only the CRT, his knowledge of the plan and concurrence in Bender's decision means he "approve[d] it [and] condone[d] it." *Chavez,* 251 F.3d at 651.

Lucker's liability is a closer call. The Defendants argue that Lucker did not make the final decision and was not part of the decision-making process. Under *Chavez,* however, liability can attach even if a supervisor is not part of the decision-making process. Lucker admitted that he participated in the discussion with Bender, Zelt, and Hunter about the use of force, and Lucker in his testimony recounted the details of the factors that the supervisors considered to determine whether to use force against Escobedo to end the standoff. The Defendants' answers to the Plaintiff's interrogatories stated that Lucker participated and was involved in the decision to use tear gas. Bender said that he consulted with Lucker about using tear gas and raiding the apartment, and that, when he made the final decision, "Lucker agreed with me." Hence, Lucker was aware of what the plan was and the fact that it would take place. *See Smith v. Rowe,* 761 F.2d 360, 369 (7th Cir. 1985) ("Like the sheriff in *Wolf-Lillie,* [the defendant] knew of the

actions of his subordinates which resulted in a constitutional violation. Also, both failed to take any preventive action."). Lucker may not have facilitated the plan to use force against Escobedo, but a jury could find that he approved the plan by agreeing with Bender or that he condoned it by not voicing concern or objection or by not proposing delay or an alternative course of action. Lucker's rank is also a factor here. Lucker held the same rank as Bender. Even though Bender was the scene commander, Lucker certainly had the authority and stature to raise concerns with a peer (Bender) and two subordinates (Hunter and Zelt) about the actions of other subordinates (the entry team).

Accordingly, all four supervisory officers are not entitled to summary judgment for the excessive force claims where a jury could find that police violated Escobedo's rights: when Martin, as ordered, fired tear gas into the apartment, and when the entry team, as ordered, breached the apartment and bedroom with tear gas and flash bang grenades.

(b) *Failure to Train*

In addition to pointing to these supervisors' direct orders, the Plaintiff contends that "their actions also subject them to an alternative theory of supervisory liability based on their failure to train or supervise their subordinate officers in a way that was very likely to violated Escobedo's constitutional rights." (DE 49 at 69.) The Plaintiff points to the

supervisors "haste, loud weapons, and overtly aggressive tactics in response to a lone and suicidal, non-homicidal, and mentally-disturbed man." (*Id.*) She argues that the supervisors "armed their subordinates with tear gas launchers and ordered such a large amount to be deployed that one would later describe it as being twelve times as much as necessary." (*Id.*) Other actions that the Plaintiff points to are the instructions to cut off negotiations, sending in tactical officers with more gas and flash bang grenades that they were "obviously untrained" how to deploy. (*Id.*) The Defendants argue that the Plaintiff has not satisfied the stringent burden of establishing a need for training, or that there is a causal connection between any lack of training and Escobedo's injury.

The Plaintiff's brief is completely devoid of any case law in support of this alternative theory of liability against the supervisors as individuals. *See Sanville v. McCaughtry,* 266 F.3d 724, 739 (7th Cir. 2001) (noting that "failure to train claims are usually maintained against municipalities, not against individuals"). Nor does the Plaintiff designate any evidence that the training was deficient. The Plaintiff simply relies on the results of the subordinates' actions to infer that the training was inadequate.

The Defendant correctly points out that the Seventh Circuit has ruled that "failing merely to instruct police on the handling of dangerous people who appear to be irrational cannot amount to

deliberate indifference" unless some other circumstances are present, *Pena v. Leombruni,* 200 F.3d 1031, 1033 (7th Cir. 1999) (ruling that defendant sheriff was not liable for failing to issue instructions for dealing with insane persons), such as not training employees about "a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face . . . or after learning of a pattern of constitutional violations involving the exercise of police discretion." *Robles v. City of Fort Wayne,* 113 F.3d 732, 735 (7th Cir. 1997) "Under either scenario, the finding of deliberate indifference is derived from the City's failure to act in the face of actual or constructive notice that such a failure is likely to result in constitutional deprivations." *Id.* (internal quotations omitted). The Plaintiff has not pointed to any factual information in the record to support the contention that the supervisors had notice of likely constitutional deprivations. Morever, the Defendants' deposition testimony includes discussion of training they received and conducted dealing with disturbed individuals.

2. *Fourth Amendment Claim for Warrantless Entry*

The Defendants stated in a footnote in their motion for summary judgment that the Plaintiff brought only excessive force claims against the Defendants and had raised no claim that officers' warrantless entry into Escobedo's apartment violated his constitutional rights. In response, the Plaintiff

asserts that the Defendants "are wrong in believing that this claim is not encompassed in the present action." (DE 49 at 41.) One of the theories of liability that the Plaintiff asserts in her response to the Defendants' motion for summary judgment is that the supervisory officers, Hunt, Zelt, Bender, and Lucker, and the entry team, consisting of Martin, Brown, Straub, and Selvia, violated Escobedo's constitutional rights when the entry team physically entered Escobedo's apartment without a warrant. In their reply, the Defendants' maintain their position that the Plaintiff's complaint cannot be read to assert a claim for unlawful entry in violation of the Fourth Amendment. In the alternative, they argue that exigent circumstances justified their entry, and that they are entitled to qualified immunity.

The Plaintiff's Complaint details the events of July 19, 2005, beginning with Escobedo's 911 call and ending with his death. The Complaint then sets forth the causes of action that the Plaintiff is pursuing as a result of the events of July 19, 2005. The first is a federal claim pursuant to 42 U.S.C. § 1983 against individual defendants. Paragraph 77 states that "Defendants Martin, Brown, Westfield, Straub, Ebetino, Lee, [and] Selvia's use of force in detaining and seizing the decedent was excessive and violated Mr. Escobedo's constitutional rights." (Compl. ¶ 77.) The next paragraph alleges that the Defendants supervising the officers named in paragraph 77 caused the violation of Escobedo's constitutional rights by their knowing, willful, reckless, and

deliberate indifference to the constitutional violations caused by those officers. (Compl. ¶ 78.) The Plaintiff alleges that the Defendants were acting under color of law and in the scope of their employment and that their "unlawful conduct was the proximate cause of death of Rudy Escobedo." (Compl., ¶¶ 79, 80.) Under the only other cause of action listed in the Complaint, the Plaintiff seeks damages from the City of Fort Wayne under Indiana state law for Escobedo's death. (Compl., ¶¶ 81-82; prayer for relief.)

The Plaintiff argues that the claim for warrantless entry is included in the federal cause of action set forth in the Complaint. That claim specifically refers to the excessive "use of force in detaining and seizing the decedent" and to Escobedo's death. It is reasonable to infer that the entry, including the use of chemical agents and flash bang grenades, is included in this claim for excessive force. It is more questionable whether the fact that the entry was without a warrant can reasonably be included in the claim – which is designated as one for "use of force." It is also unlikely that the Plaintiff is claiming that the fact that the entry was without warrant was one of the proximate causes of Escobedo's death, as there is no indication that obtaining a warrant to justify the entry would have altered the manner of entry.

Thus, it is a close call whether the Defendants were on notice that the litigation involved not only their use of force during their seizure of Escobedo, including the entry into his apartment, but also that

their entry was without a warrant. However, because the Complaint includes the necessary factual elements of such a claim – warrantless entry into a home – and because the Plaintiff invokes § 1983, the Court will read the Complaint broadly to include a claim for warrantless entry into the home.

The Defendants argue that even if the Complaint is read to assert a claim for unlawful entry, the Defendants were justified in entering without a warrant due to exigent circumstances. They further argue that, even if the Court finds that their entry was unlawful, they are entitled to qualified immunity. The Plaintiff argues that no exigent circumstances existed because the Defendants were on the scene for several hours before deciding to enter the apartment. She argues that at any point during this time, an officer could have been dispatched to obtain a warrant.

(a) *Was Warrantless Entry a Violation of Escobedo's Constitutional Rights?*

A police officer's entry into a home without a warrant is presumptively unconstitutional under the Fourth Amendment, *Leaf v. Shelnutt*, 400 F.3d 1070, 1081 (7th Cir. 2005), but warrantless entry is permissible if exigent circumstances exist. *Id.* Exigent circumstances exist when there is a compelling need for official action and no time to secure a warrant. *United States v. Arch*, 7 F.3d 1300, 1304 (7th Cir. 1993). For example, exigent circumstances are

present when the police reasonably fear for the safety of someone inside the premises. *Leaf*, 400 F.3d at 1081. A court must analyze the situation from the perspective of the officers on the scene. *United States v. Marshall*, 157 F.3d 477, 482 (7th Cir. 1998).

Here, it is undisputed that Escobedo called 911 stating that he had a gun to his head, that he had taken cocaine, and that he had refused to leave the apartment, saying both that he would kill himself and that he did not want to die. Escobedo also claimed that police were already in his apartment when they were not. The Defendants maintain that entering a house to assist a suicidal or mentally ill person is justified by exigent circumstances. However, neither party points to a case that establishes these factors as creating the necessary exigency to forego the requirement of a warrant. In *Estate of Bing v. City of Whitehall*, a case from the Sixth Circuit, the occupant was not only believed to be suicidal, but also homicidal. 456 F.3d 555 (6th Cir. 2006). In *Bing*, the court found that the following facts supported the conclusion that a dangerous exigency justified entry into Bing's home without a warrant:

> (1) Bing discharged a firearm near neighborhood minors; (2) Bing continued to have access to a gun inside the house; (3) the police had been called to Bing's residence on previous occasions because he previously had fired shots; (4) the police could see Bing move from room to room, demonstrating that police and bystanders were probably within

> range of Bing's gun; (5) people in the street reported that Bing appeared intoxicated, making it reasonable to expect that he would act unstably; (6) a crowd was gathered in the street near Bing's house, and people in the neighborhood refused to evacuate. In other words, Bing had shown a willingness to fire weapons in his neighborhood and could have harmed others in an instant with little effort. Therefore, a dangerous exigency existed.

Bing, 456 F.3d at 564 (holding that these facts demonstrated that suspect had a willingness to use a weapon). In *Bing*, the court also addressed the passage of time, holding that it did not terminate the exigency. The court reasoned, that "the ticking of the clock did nothing to cut off Bing's access to his gun, or cure him of his willingness to fire it, or move to safety the people nearby who refused to evacuate." *Id.* at 565 (stating that exigent circumstances terminated when factors creating the exigency are negated).

Although Escobedo had access to a gun and his apartment was located in a populated area, one major factor distinguishes this case from *Bing*. Unlike in *Bing*, the Defendants do not point to anything indicating that it was reasonable to expect that Escobedo would become homicidal. He had not shot his gun or threatened to shoot his gun, except to kill himself. Nor did he show himself at the apartment windows, thereby demonstrating that any bystanders were within his range. Additionally, snipers were observing the windows of his apartment. Thus, while the Court does not believe that the mere passage of

time is sufficient to negate factors that create exigency, the exigency must have existed in the first place.

In response to that point, the Defendants argue that "[a]ttempting to provide assistance to and rescue a suicidal person constitutes exigent circumstances." (DE 72 at 25.) The Defendants note that, in *Russo v. City of Cincinnati*, 953 F.2d 1036, 1044 (6th Cir. 1992), the court stated: "Plaintiffs fail to cite a single case indicating that an officer's attempt to rescue what that officer believes to be a suicidal person does not constitute exigent circumstances, nor are we aware of such precedent." However, this statement was made not to establish that a suicidal person creates exigent circumstances but to highlight that it was not clearly established that exigent circumstances did not exist to assist a suicidal person. 953 F.2d at 1043-44 (granting qualified immunity to officer who entered apartment without warrant to seize mentally disturbed, suicidal person who had two large knives in his possession and had fallen silent).

For her part, the Plaintiff concentrates on the passage of time as evidence that no exigency existed to enter Escobedo's apartment. But as the Court already stated, arguments about the passage of time are secondary to determining whether exigency existed in the first place. The passage of time only has relevance to the extent it affects the factors that created the exigency. For example, if exigency existed by virtue of Escobedo's suicidal threats and the

means to carry them out, the time spent devising a plan and attempting to deal with the situation did not negate the exigency any more than the passage of time negated the danger present in *Bing*. There is no evidence that Escobedo no longer had a gun, was becoming more rational, or that his threats took on a less serious tone as time was spent trying to negotiate with him such that any exigency created by his suicide threats dissipated with time.

However, whether a threat of suicide is an exigent circumstance, and under what circumstances, remains unclear. Assuming that such a threat can create exigent circumstances, the Court finds that genuine issues of fact remain regarding the danger that Escobedo presented to himself, particularly whether it was so imminent that there was no time to secure a warrant. Ebetino stated that he did not feel that it was imminent that Escobedo would commit suicide, but that, each time Escobedo mentioned suicide, Ebetino became more fearful that it would happen. The officers knew that Escobedo was under the influence of cocaine and that his thoughts were not rational. However, they also knew that Escobedo said that he did not want to die and that he was building a rapport with Ebetino.

Assuming for purposes of summary judgment that the police were not reasonable to believe that they did not need a warrant to enter Escobedo's apartment, the Plaintiff must still establish that the right was clearly established to defeat the Defendants' claim of qualified immunity.

(b) *Qualified Immunity and Clearly Established Right*

To defeat the Defendants' claim for qualified immunity, the Plaintiff must show that, under clearly established law, exigent circumstances did not exist that would justify the officer's forcible entry into Escobedo's apartment. The Supreme Court has said that the right must be established in a "particularized" sense. *Anderson,* 483 U.S. at 640 (holding that the contours of the right must be sufficiently clear that a reasonable officer would understand that what he is doing violates that right); *see also Saucier,* 533 U.S. at 201-02 (stating that the relevant inquiry is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted"). The Plaintiff does not cite any case indicating that a suicidal person, like Escobedo, does not create exigent circumstances. Nor does she point to any closely analogous case.

The Plaintiff's failure to point to any such case highlights that the law was not clear that a warrant was required to assist, through entry into his home, a person in Escobedo's situation. A reasonable officer could not anticipate that a court might decide that exigent circumstances do not exist when the occupant of a dwelling is suicidal and in an impaired frame of mind. Even taking the events most favorable to the Plaintiff, and assuming that the Defendants were mistaken that they did not need a warrant, the Defendants are entitled to qualified immunity because their decision was reasonable. Stated

differently, it would not have been apparent that entering Escobedo's apartment under the circumstances of this case violated his Fourth Amendment rights; the right of an impaired and suicidal person to be free from warrantless police entry into their dwelling was not clearly established. Qualified immunity is intended to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341(1986). Therefore, the Defendants are immune from the Plaintiff's § 1983 claim for their warrantless entry into Escobedo's apartment.

3. *Due Process Claim*

In her surreply, the Plaintiff asserts a theory of liability not previously mentioned or advanced in this litigation. The Plaintiff argues that the facts establish that the Defendants intentionally cut off all communication with Escobedo after the tear gas was fired into the apartment and did not respond to calls that Escobedo made to cellular phone number of the first negotiating officer, Taylor. The Plaintiff submits that this violated the Defendants' own standard protocol and was egregious conduct that shocks the conscience. The Plaintiff contends that this willful indifference to Escobedo's safety and his life is a substantive due process violation that can be pursued through § 1983.

The Defendants argue that there are several flaws in the Plaintiff's theory that entitles them to

summary judgment. First, the Plaintiff's reliance on Escobedo's unanswered attempts to call the negotiator is explained, not by officers' deliberate indifference to Escobedo, but by the fact that Escobedo did not call the telephone being used for negotiations at the time when the gas was introduced into the apartment, and by the fact that all communication equipment was abandoned on the seventh floor when the officers without gas masks had to leave the area. The Defendants also submit that a failure to comply with standard operating procedure does not rise to the level of a constitutional violation. The Defendants note that the Plaintiff's claim is not properly before the Court, having never been alleged in a pleading, but that even if it is considered, it fails on the merits because Escobedo himself, and not any affirmative action by the Defendants, created the danger.

The Court finds that another reason precludes the Plaintiff's due process claim. The Constitution's requirements for arrests and seizures appear in the Fourth Amendment. Because a specific constitutional amendment governs the Plaintiff's claim that the Defendants' seizure was unlawful and unreasonable, the Plaintiff cannot assert a substantive due process claim. *Graham v. Connor,* 490 U.S. 386, 393-94 (1989) (holding that a claim of abusive governmental conduct that implicates a specific constitutional right must be analyzed as a violation of that right, rather than as a violation of substantive due process). In *Graham,* the Court explicitly stated that "*all* claims

that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." 490 U.S. at 395. The Plaintiff's attempt to isolate certain state action, or inaction, that arose during the course of the Defendants' seizure of Escobedo and analyze it as a substantive due process claim is improper. While ending communication with Escobedo and not reestablishing it is not itself a "seizure," it is alleged to be actionable because it occurred in the context of a seizure. Without the seizure, the failure to answer the Plaintiffs' phone calls would not be an issue. Thus, as discussed earlier, ending communications is part of the totality of circumstances in the Court's consideration of whether the use of force in this case was reasonable, but it is not in and of itself actionable as a due process claim.

4. *Wrongful Death Action – Indiana Law*

The Plaintiff asserts a wrongful death claim against the City of Fort Wayne pursuant to Indiana Code § 34-23-1-2, the Indiana Tort Claims Act (ITCA). This is the only claim brought against the City.

The Defendants assert that the Plaintiff's wrongful death action is barred because she did not comply with the notice provisions of the ITCA. The Plaintiff argues that Indiana recognizes "substantial

compliance" where the purposes of the notice provisions have been satisfied. She contends that the purposes of the statute were satisfied in this case through communication from the Plaintiff's counsel to the Mayor of Fort Wayne, the Allen County Coroner, the Allen County Prosecutor, and the filing of a lawsuit – all of which informed the city officials of the time, place, cause, and nature of the tort, as well as the nature and extent of the injuries, so the that City could investigate, determine its liability, and prepare a defense. The Plaintiff maintains that there is ample evidence that the City was aware of the claims and investigated them during the statutory notice period.

(a) *ITCA Notice Requirement*

The ITCA governs tort claims against governmental entities, such as the City of Fort Wayne. Under the ITCA, a claim against a political subdivision is barred unless notice is filed with the governing body of the political subdivision and with the Indiana political subdivision risk management commission, if applicable, within 180 days after the loss occurs. Ind. Code § 34-13-3-8. Because Escobedo's death occurred on July 19, 2005, the 180-day notice period ended on January 15, 2006.

The statute also prescribes the form and contents of the notice:

> The notice . . . must describe in a short and plain statement the facts on which the claim

> is based. The statement must include the circumstances which brought about the loss, the extent of the loss, the time and place the loss occurred, the names of all persons involved if known, the amount of the damages sought, and the residence of the person making the claim at the time of the loss and at the time of filing the notice.

Ind. Code. § 34-13-3-10. The notice must be in writing and delivered in person or by registered or certified mail. Ind. Code § 34-13-3-12. The governmental entity then has 90 days to approve or deny the claim, Ind. Code § 34-13-3-11, and a plaintiff "may not initiate a suit against a governmental entity unless the person's claim has been denied in whole or in part," Ind. Code § 34-13-3-13.

In their answer to the complaint, the Defendants allege the Plaintiff's failure to comply with the notice requirements as an affirmative defense. The Plaintiff does not dispute that she did not submit the written notice described in the statute to the City's governing body. Generally, the failure to comply with the requirements of the notice statute will subject a claim to summary dismissal. *Allen v. Lake County Jail*, 496 N.E.2d 412, 414 (Ind. Ct. App. 1986). However, Indiana courts have advanced a liberal application of the requirements of the ITCA notice statute "in order to avoid denying plaintiffs an opportunity to bring a claim where the purpose of the statute has been satisfied." *Brown v. Alexander*, 876 N.E.2d 376, 381 (Ind. Ct. App. 2007). Not all technical violations of the

statute are fatal to a claim; non-compliance has been excused based on the theory of substantial compliance, which "focuses on the nature of the notice itself, and is concerned with the extent to which the form, content, and timing of the notice given by a plaintiff complies with the statutory requirements" of the notice statute. *Allen*, 496 N.E.2d at 415.

The parties' dispute regarding the notice requirement is question of law for the court. *See Brown*, 876 N.E.2d at 380 ("Compliance with the ITCA is a question of law and properly determined by the court."). The Plaintiff bears the burden of establishing substantial compliance. *Id.* at 384; *Irwin Mortg. Corp. v. Marion County Treasurer*, 816 N.E.2d 439, 446 (Ind. Ct. App. 2004).

(b) *Substantial Compliance*

The rationale for substantial compliance was set forth by the Indiana Supreme Court in *Galbreath v. City of Indianapolis*, 255 N.E.2d 225, 229 (Ind. 1970). "Substantial compliance was adopted to prevent the notice statute from becoming a trap for the unwary." *Brown*, 876 N.E.2d at 382 (citing *Galbreath*, 255 N.E.2d at 229 and *Porter v. Fort Wayne Cmty. Schs.*, 743 N.E.2d 341, 344 (Ind. Ct .App. 2001)). Generally, an evaluation of substantial compliance looks not at the information held by the governmental entity, but to the efforts the claimant made to notify the governmental entity of a claim. *Brown*, 976 N.E.2d at 382. Thus, an action may proceed "when a claimant

has attempted to provide notice, has fallen short of the strictures of the statute, and yet has supplied the appropriate governmental entity with sufficient information to investigate the claim." *Id.* (citing *Howard County Bd. of Comm'rs v. Lukowiak*, 810 N.E.2d 379, 382 (Ind. Ct. App. 2004)).

A court should not find substantial compliance where a claimant has not taken affirmative steps to comply with the notice statute, even where the governmental entity knows about its tortious actions and is clearly at fault. *Brown*, 976 N.E.2d at 383. Likewise, independently acquired knowledge or routine investigation of an event is not sufficient to show substantial compliance with the notice statute. *Id.* at 382-83 (holding no substantial compliance even when city power and light company and its claim representative were aware of automobile accident and resulting injuries, investigated the accident, settled the property damage portion of the claim, and engaged in discussions with the claimant where the claimant did not take any steps to comply with notice statute); *Fowler v. Brewer*, 773 N.E.2d 858, 864 (Ind. Ct. App. 2002) (holding that volunteer firefighter's actual knowledge of automobile accident did not satisfy notice requirement); *Coghill v. Badger*, 418 N.E.2d 1201, 1205 (Ind. Ct. App. 1981) (stating that agency's routine investigation of an occurrence did not show substantial compliance because purpose of notice requirement is to enable governmental body to inquire into the occurrence in the context that another is claiming municipal liability for the injury).

In *Orndorf v. New Albany Housing Authority*, the plaintiffs argued that they substantially complied with the ITCA's notice requirements because the governmental entity was immediately aware of the incident resulting in the claimant's injuries, investigated the incident, and expressed concern over possible litigation. 843 N.E.2d 592, 596 (Ind. Ct. App. 2006). The court disagreed, reasoning that the plaintiffs could not rely on the defendant's own knowledge of, and presence at, the incident to claim that they substantially complied with the ITCA's notice requirements. *Id.*

Thus, to show substantial compliance, it is not enough to point to the Defendants' knowledge of Escobedo's death and to the police department's own investigation into the matter. The Plaintiff must establish that she initiated contact with the City or otherwise made attempts to provide the required notice within the requisite time frame provided in the statute. Further, this communication must have satisfied the purpose of the notice statute: it must have informed the state officials with reasonable certainty of the incident and surrounding circumstances so that the state could investigate, determine its possible liability, and prepare a defense. *Fowler*, 773 N.E.2d at 863. Any such notice, in order to qualify as substantial compliance, must also advise of the claimant's intent to assert a tort claim. *Id.* In sum, Indiana law states that:

> In general, a notice filed within the required time period, that informs the municipality of

> the claimant's intent to make a claim, and contains sufficient information which reasonably affords the political subdivision an opportunity to promptly investigate the claim will satisfy the purpose of the statute and will be held to substantially comply with the statute.

Irwin Mortg. Corp., 816 N.E.2d at 446 (citing *Howard County Bd. of Comm'rs v. Lukowiak*, 810 N.E.2d 379 (Ind. Ct. App. 2004)).

The Plaintiff points to several affirmative steps that she argues demonstrate her substantial compliance with the ITCA's notice provisions. The Plaintiff first points to the lawsuit itself, filed on December 20, 2005, as evidence that she communicated the Plaintiff's tort claim to the Defendants. However, pursuant to Indiana case law, the filing of a complaint is not sufficient notice under the provisions of the ITCA. *Kantz v. Elkhart County Hwy. Dept.*, 701 N.E.2d 608, 616 (Ind. Ct. App. 1998) (affirming summary judgment where the plaintiff did not provide notice of claim before filing suit within 180 days of his injuries). In *Kantz*, the court noted that the statute prohibits a person from filing suit against a governmental entity until the governmental entity has denied a notice of tort claim. *See* Ind. Code § 34-13-3-13 ("A person may not initiate a suit against a governmental entity unless the person's claim has been denied in whole or in part."). Thus, the legislature intended the notice of claim and the complaint to be two separate documents, and "a

complaint alone could not satisfy the notice provisions of the ITCA." 701 N.E.2d at 616.

Next, the Plaintiff notes, without any citation to the record, a press conference that Escobedo's family held, a part of which was broadcast on television and reported in Fort Wayne area newspapers. A press conference certainly does not meet the statutory requirements for form, and the Plaintiff presents no evidence of the content of the press conference. *See Fowler*, 773 N.E.2d at 864 (analyzing each communication according to the standard of the statute with respect to form and content). According to the statute, the notice must include the following information in a plain and short statement: (1) the circumstances that brought about the loss; (2) the extent of the loss; (3) the time and place the loss occurred; (4) the names of all persons involved if known; (5) the amount of the damages sought; and (6) the residence of the person making the claim at the time of the loss and at the time of filing the notice. Ind. Code § 34-13-3-10. The Plaintiff has not demonstrated that the press conference substantially complied with the content requirements of the statute. Neither did it meet the form of a written notice delivered in person or by registered or certified mail. There is nothing in the record to indicate that the press conference was an attempt by the Plaintiff to provide notice that simply fell short of the ITCA's strictures.

The Plaintiff also points to the Plaintiff's counsel's January 3, 2006, contact with the Mayor of Fort Wayne, in which he conveyed concern about the

City's response to Escobedo's 911 call. There is no indication that this "contact" was in writing, contained the information required by the statute, or advised the City of the Plaintiff's intent to pursue a tort claim. Again, because the Plaintiff offers no citation to designated evidence in support of this contact, the Court cannot determine that counsel's conveyance of concern was akin to providing notice of a tort claim.

The Plaintiff states that before this, on August 26, and September 1, 2005, the Plaintiff's counsel sent letters to the Allen County Coroner seeking information. Before that, on August 5, he sent letters to the Allen County Prosecutor. Again, there is no indication that these letters, which sought information from the coroner, the Indiana State Police, and the Fort Wayne Police Department, attempted to inform the governing body of the City of Fort Wayne of a tort claim involving Escobedo. There is no evidence before this Court that these letters, which are mentioned without citation to designated evidence, met the statutory standard for form and content. The Plaintiff has not represented that she informed the City of a tort claim, much less stated the amount of the damages sought. The Plaintiff's letters did not supply the government with sufficient information to investigate a wrongful death claim. By the Plaintiff's own admission, the purpose of the letters was to gather information, not to provide notice of a claim.

The Plaintiff's communication with various entities did not substantially comply with the form or content requirements of the notice statute. And while a writing is not always necessary for substantial compliance, neither has the Plaintiff presented evidence of ongoing correspondence and negotiations between the Plaintiff and the City or its agents regarding a potential claim. This lack of settlement talk sufficiently distinguishes this case from *City of Tipton v. Baxter*, 593 N.E.2d 1280 (Ind. Ct. App. 1992). In *Baxter*, the city's insurer had actual knowledge of the accident within days, conducted an investigation, indicated a willingness to settle, and took affirmative steps toward resolution of a claim. *Id.* at 1284. Here, there was no discussion of a potential resolution of any claim. The only communication from the government that the Plaintiff mentions is a response to a public documents request that includes a thirty-seven-page report entitled "Fort Wayne Police Department – Investigative Division." The report, according to the Plaintiff, was an investigation into the events and circumstances leading to Escobedo's death. There is no evidence that the police department's investigation was in response to any notice submitted by the Plaintiff. As the Court state above, the Fort Wayne Police Department's actual knowledge of the events surrounding Escobedo's death, and its own internal investigation, does not eliminate the requirement that the Plaintiff give notice under the ITCA. *Brown*, 976 N.E.2d at 384; *Fowler*, 773 N.E.2d at 865; *Coghill*, 418 N.E.2d at 1205.

> In cases of sovereign immunity, it is difficult to strike the proper balance between the right of the sovereign to set the parameters of its immunity waiver and the social desirability of spreading the injured party's loss to those who are responsible for negligent actions. The ITCA attempted to strike this balance by operating as an unequivocal statement of a political subdivision's consent to be sued in tort provided certain qualifications are fulfilled. These qualifications are not onerous. A claimant must provide notice of a claim and allow the governmental entity to approve or deny the claim.

Brown, 876 N.E.2d at 383 (internal citation omitted). The purpose of the statute has not been satisfied, and the City is entitled to dismissal of the wrongful death action brought against it. As this is the only claim that the Plaintiff brought against the City, it is dismissed from this suit.

CONCLUSION

For the foregoing reasons, the Defendants' Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART. Defendants Ebetino and the City of Fort Wayne are DISMISSED from this case. The excessive force claims against Martin and Brown for the fatal shooting of Escobedo are DISMISSED. The following claims also are DISMISSED: failure to train, warrantless entry, substantive due process, and wrongful death under state

law. The following claims against the following Defendants remain pending for resolution at trial, set and reaffirmed for December 1, 2008: the excessive force claim against Martin for firing tear gas into Escobedo's apartment; the supervisory liability claim against the supervisors – Bender, Lucker, Zelt, and Hunter – for the tear gas fired into the apartment; the excessive force claim against the entry team – Selvia, Martin, Brown, and Straub – for the raid on the apartment and bedroom with tear gas and flash bang grenades; and supervisory liability claim against the supervisors – Bender, Lucker, Zelt, and Hunter – for the entry team's raid.

So ORDERED on May 5, 2008.

/s/ Theresa L. Springmann
THERESA L. SPRINGMANN
UNITED STATES
DISTRICT COURT

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

May 12, 2010

Before

DANIEL A. MANION, *Circuit Judge*

MICHAEL S. KANNE, *Circuit judge*

VIRGINIA M. KENDALL, *District Judge**

No. 08-2365

ESTATE OF RUDY ESCOBEDO (Deceased) (Raquel Hanic, Personal Representative of Estate),

Plaintiff-Appellee,

v.

MARTIN BENDER, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division

No. 05 C 0424

Theresa L. Springmann, *Judge.*

ORDER

On consideration of the petition for rehearing and rehearing en banc, no judge in active service has requested a vote on the petition for rehearing en banc and the judges on the panel have voted to deny

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* Hon. Virginia M. Kendall, District Judge for the Northern District of Illinois, is sitting by designation.

rehearing. It is, therefore, ORDERED that rehearing and rehearing en banc are **DENIED**.

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(2)

No. 10-170

Supreme Court, U.S.
FILED
SEP 3 - 2010
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In The
Supreme Court of the United States

OFFICER BRIAN MARTIN, OFFICER JASON BROWN, OFFICER SCOTT STRAUB, SERGEANT TIM SELVIA, SERGEANT KEVIN HUNTER, LIEUTENANT KEVIN ZELT, DEPUTY CHIEF MARTIN A. BENDER, and DEPUTY CHIEF DOUGLAS A. LUCKER, each in his individual capacity,

Petitioners,

v.

ESTATE OF RUDY ESCOBEDO (Deceased), RAQUEL HANIC, Personal Representative of Estate,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should the Court grant a petition for certiorari that admits that the Seventh Circuit properly articulated the qualified immunity standard, but challenges the court's application of that standard in affirming, on interlocutory appeal, the district court's denial of qualified immunity?

2. Should the Court grant a petition for certiorari to provide general guidelines on the constitutional limits on the use of tear gas and flash-bang grenades in the absence of a division among the circuit courts of appeals on the appropriate standards?

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INTRODUCTION

The Petitioners, named defendants in this case, ask this Court to review the Seventh Circuit's disposition of their interlocutory appeal of the denial of qualified immunity. The Petition does not identify any error in the decisions from the Seventh Circuit or the district court, let alone a decision that conflicts with relevant decisions of this Court or another Circuit Court of Appeals, and it identifies no other compelling reason for granting certiorari. The Petition should be denied.

The Petitioners contend that the Seventh Circuit applied an improper summary judgment standard, which significantly lowered the plaintiff's burden. Both the Seventh Circuit and the district court faithfully applied the qualified immunity standard set forth by this Court, and both correctly rejected the Petitioners' claim of qualified immunity. The Seventh Circuit and the district court both properly held that it was clearly established that the Petitioners' entry into Escobedo's apartment, preceded by an assault with tear gas and flash-bang grenades, violated Escobedo's constitutional rights.

The Petitioners also urge this Court to grant certiorari so that the Court can provide guidance on the constitutional limitations on the use of tear gas and flash-bang grenades against barricaded, suicidal individuals. The Court should deny this request. There is no circuit split on the use of these weapons. Moreover, the Petitioners' tactics and use of these

weapons in this tragic case clearly exceeded the bounds of reasonableness, making this case a poor vehicle for the Court to provide guidance on their use in closer cases.

STATEMENT OF THE CASE

The Petitioner's recitation of the facts in their Statement of the Case, Pet. 5-10, is a verbatim reproduction of the statement of facts in their Appellate Brief before the Seventh Circuit. The Petitioner's Statement of the Case omits numerous material facts relied on by the district court and the Seventh Circuit. Specifically, Petitioners omit almost all of the facts favorable to the Respondent, the Estate of Rudy Escobedo ("Estate"). This Statement of the Case does not comply with Supreme Court Rule 14(1)(g), which requires the Petition to include "[a] concise statement of the case setting out the facts material to consideration of the questions presented[.]" Sup. Ct. R. 14(1)(g). The Petitioners do not challenge the Seventh Circuit's or the District Court's determination of the material facts at issue, which they could not do on interlocutory appeal. *Johnson v. Jones*, 515 U.S. 304, 313 (1995) (limiting interlocutory review of denial of qualified immunity to question of whether law was clearly established, and not to a "district court's determination about what factual issues are genuine") (internal quotation removed).

The Seventh Circuit discussed the relevant facts at App. 2-13.[1] The district court discussed the facts in greater detail at App. 49-84. For the convenience of the Court, a summary of the material facts as set forth by the Seventh Circuit and the district court is included below. This summary illustrates the numerous omissions in the Petitioners' recitation of the facts.

On July 19, 2005, at 4:24 a.m., Rudy Escobedo called 911 and told the dispatcher that he was armed with a gun and wanted to shoot himself, and that he was high on cocaine. App. 2-3. Escobedo asked the dispatcher to contact his psychologist, and provided a phone number. App. 3. Escobedo repeated throughout the call that while he wanted to kill himself, he had no intention of hurting anyone else, including the police. *Id.* During the call, Escobedo was delusional, at times speaking to police officers that he believed had entered his apartment. App. 51-52. Escobedo stressed that he did not want to hurt the police. App. 52. The District Court summarized Escobedo's call: "The overall tone of the call indicates that Escobedo was in despair about his drug addiction and his life in general, and that he was suicidal." App. 3, 53.

At approximately 4:55 a.m., Sergeant C.M. Taylor arrived at Escobedo's apartment building and called Escobedo via his personal cell phone from

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[1] All references to the Appendix are to the Petitioner's Appendix.

outside Escobedo's door. App. 3. Escobedo told Taylor that he was armed and planned to commit suicide. *Id.* Taylor said Escobedo sounded delusional, but did not threaten police officers or the public in any way. App. 54. At approximately 5:20 a.m., Taylor decided to contact the Crisis Response Team ("CRT"), who functioned as negotiators, and the Emergency Response Team ("ERT"), who were the tactical or SWAT team. App. 3, 50.

When the CRT and ERT arrived, Officer Bernard Ebetino of the CRT took over negotiations. App. 3. Escobedo repeated that he was suicidal and armed and again asked to speak with his psychologist and requested help for his drug addiction. App. 4. At approximately 6:23 a.m., the CRT began using a "direct link phone system," which allowed other officers to listen to the negotiations. *Id.* The direct link system should have allowed the CRT commanders (who were located on the street outside the apartment building) to listen to the negotiations, but that was not done in this case. *Id.* Instead of listening in directly, the CRT commander relied on information relayed by other CRT officers located outside Escobedo's door. *Id.* This failure to follow normal procedures resulted in the commanders on the ground not learning important information about the negotiations. *Id.*

When Ebetino began using the direct link system, he stopped using Taylor's cell phone and switched to another officer's personal cell phone. *Id.* Escobedo was not told of the change in phones or

given the new phone number. App. 56. Taylor's phone, which was the only phone that Escobedo had the number for, was not used again. App. 4, 56. Ebetino continued speaking with Escobedo for the next several hours, and Escobedo continued threatening suicide and expressing fear of being killed by the police. App. 5. Ebetino thought Escobedo was making progress at some points, while at other times was regressing. *Id.* At certain times, Ebetino thought he heard Escobedo barricading his door; at other times, Ebetino thought Escobedo was removing the barricade. *Id.* Ebetino believed that the commanders on the street were told about both the positive developments and the negative ones, but that was not always the case. *Id.* The commanders were not told about Escobedo removing the barricade and, more importantly, that Escobedo had stated that he was not going to hurt the police or anyone else but himself. App. 5, 6.

Ebetino stated that during the negotiations Escobedo did not make any statements that could be construed as threats to the public or to the officers, with one possible exception: minutes before the first tear gas assault, Escobedo said that he would come out of his apartment, but that he wanted to bring his gun. *Id.*

At one point during the negotiations, Sergeant Kevin Hunter, head of the CRT, got in touch with Escobedo's psychologist, who stated that he did not think that Escobedo had a history of using weapons or attempting suicide. *Id.* Escobedo's psychologist was not invited to the scene. App. 57.

The idea of using tear gas in an attempt to extricate Escobedo was first mentioned as early as 6:45 a.m.[2] App. 59. This was first suggested by Lieutenant Kevin Zelt, head of the ERT. App. 6. Deputy Chief Martin Bender, the overall commander of the scene, made the decision to use tear gas some time after 8:00 a.m. *Id.* Zelt gave numerous reasons for recommending the use of tear gas. Zelt stated that tear gas was "the next logical step" when negotiations are not progressing and the target is barricading and fortifying his position. App. 6. Zelt also stated that he believed Escobedo had made threats of some kind, but he could not identify a single statement Escobedo allegedly made; additionally, he may have formed this belief after the incident ended. App. 7. Zelt also stated that the decision to use tear gas was motivated by concern that the officers' readiness was deteriorating because it was hot outside. *Id.* Hunter also suggested that they decided to use tear gas to try to end the encounter out of concern for the increasing number of people who would be heading downtown during rush hour, though Zelt admitted that most people going downtown would be at work by 8:30, the commanders' deadline for using tear gas. App. 7, 64.

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[2] The Petitioners contend that the use of tear gas was not discussed until sometime around 8:00 a.m., citing the deposition testimony of Hunter. Pet. 6. However, Hunter testified that it was possible that tear gas was discussed as early as 6:45 a.m. (Doc. 37-13, p. 3), consistent with Ebetino's recollection. App. 59.

The commanders did not believe that Escobedo had committed any crime at that point, and the district court found that the only crime for which there was any evidence was possession of cocaine. App. 7, 63. Moreover, the goal was not to arrest Escobedo, but to take him into custody for a 24-hour mental health detention. App. 7.

Both the Seventh Circuit and the District Court considered the testimony of the Estate's police practices expert, Larry Danaher. Danaher opined that (1) Escobedo did not pose a threat to the officers or the public that required the use of force; (2) the decision to use force was premature and based on flawed priorities; and (3) the use of force escalated the situation and unnecessarily created a scenario that led to Escobedo's death. App. 8, 66-67.

Ebetino continued to negotiate with Escobedo after the decision to use tear gas was made. App. 8. At approximately 8:28 a.m., Escobedo told Ebetino that he would come out of the apartment, but he would bring his gun with him. *Id.* At 8:30 a.m., Escobedo told Ebetino that he was going to come out in three (3) minutes. *Id.* Ebetino asked for another three (3) minutes, but did not request any additional time after Escobedo failed to come out. *Id.* Ebetino was told to wind down the conversation with Escobedo before the deployment of tear gas, even though doing so was against normal procedures. App. 8-9. Escobedo was not told that they would soon use tear gas against him. *Id.*

While negotiations were winding down, Zelt calculated what he believed was an "incapacitating concentration" of tear gas based on the size of Escobedo's apartment. *Id.* Zelt chose six .37 millimeter liquid rounds, six .37 millimeter Sage powder, and five or ten .12 gauge munitions. App. 9. Officer Brian Martin[3] and two other ERT members fired the tear gas into Escobedo's apartment through a window. *Id.* After the tear gas was fired, the tear gas fumes forced Ebetino and the other CRT members, who had no gas masks, to leave their position outside Escobedo's door, leaving the communication equipment behind, and cutting off all communication with Escobedo. *Id.* Ending communication after chemical agents are used is against normal practice and procedure, and in this case prevented Escobedo from negotiating an end to the confrontation. *Id.*

Escobedo did attempt to contact Ebetino after the first round of tear gas, dialing the number for Taylor's cell phone three or four times. App. 10. The negotiators were no longer using that phone, and did not answer his calls. *Id.* Zelt ordered a second round of tear gas at 8:43 a.m., ten minutes after the first volley. App. 9. Escobedo again attempted to reach Ebetino by calling Taylor's phone another one or two

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[3] Petitioners incorrectly identify Officer Jason Brown, rather than Brian Martin, as being part of the tear gas assault team. Pet. 7. Respondent pointed this out to Petitioners when they made the same error in their Appellants' Brief and Amended Appellants' Brief.

times (in total making five calls), still to no avail. App. 10. The police waited another ten minutes, and then decided to send an ERT team into Escobedo's apartment to remove him. *Id.* The entry team included Officers Tim Selvia, Brian Martin, Jason Brown, Scott Straub, and others. *Id.* The entry team broke down the door and deployed a canister of "clear-out" – more tear gas. *Id.* After a few minutes, the team threw in another canister of clear-out. *Id.* Between the tear gas fired in through the window and the two canisters of clear-out, there was approximately twelve (12) times the incapacitating concentration of tear gas in Escobedo's apartment. *Id.*

The team then entered the apartment, first throwing in a flash-bang grenade. *Id.* A flash-bang grenade emits an intense light and extremely loud sound. *Id.* The flash-bang grenade ignited the propellant from one of the tear gas canisters, starting a fire in the apartment. App. 10-11. The entry team entered the apartment and extinguished the fire, then began looking for Escobedo in the main room. App. 10. The officers realized Escobedo was likely in the bedroom and tried to go in there. App. 11. Escobedo had apparently barricaded the door, so the officers forced it open. *Id.* Escobedo yelled to the officers that he had a gun to his head. *Id.* After opening the door slightly, one of the officers threw a second flash-bang grenade into the bedroom, which exploded within a foot or two of Escobedo's head. *Id.* The explosion likely rendered Escobedo temporarily blind and deaf. App. 11-12. The officers then opened the door and entered. App. 11.

Officers Martin and Brown found Escobedo sitting in the closet holding the gun in his left hand, upside down, pointed at his head. App. 11, 80. Martin asserted that he told Escobedo to drop the gun, and that he thought he saw Escobedo lower it and point it in his direction. App. 80. Officers Martin and Brown fired at Escobedo, claiming they feared for Martin's life. App. 11. Escobedo was declared dead at the scene a short time later. *Id.*

On December 20, 2005, the Estate filed a complaint in the Northern District of Indiana under 42 U.S.C. § 1983, alleging, among other things, that the Petitioners used excessive force against Escobedo when they deployed tear gas and flash-bang grenades against him. App. 12. On January 22, 2007, the Petitioners (and other defendants who are not part of this appeal) moved for summary judgment, arguing in part that they were entitled to qualified immunity. *Id.* On May 5, 2007, the district court granted the motion as to some of the claims, and denied it as to others, and denied qualified immunity for the use of tear gas and flash-bang grenades. App. 12, 45. The Petitioners challenged the denial of qualified immunity in an interlocutory appeal to the Seventh Circuit. App. 13.[4] On April 5, 2010, the Seventh Circuit

[4] The Estate filed a motion with the district court for interlocutory certification pursuant to 28 U.S.C. § 1292(b) regarding some of the claims for which the district court granted summary judgment. App. 14 n.2. The district court granted the motion and the Estate petitioned the Seventh Circuit for an interlocutory appeal. *Id.* The Estate's petition was denied, and

(Continued on following page)

affirmed. App. 1-2. The Petitioners filed a petition for rehearing and rehearing *en banc*, which was denied in an order dated May 12, 2010. App. 154. The Petitioners filed this Petition asking the Court to grant certiorari to reverse the Seventh Circuit.

REASONS FOR DENYING THE PETITION

The Petition essentially suggests two reasons for granting certiorari. First, the Petitioners argue that the Seventh Circuit strayed from this Court's precedent and lowered the standard for defeating a claim of qualified immunity. Had the Seventh Circuit applied the appropriate standard, the Petitioners contend, the Seventh Circuit should have granted qualified immunity. Second, the Petitioners suggest that the Court should grant certiorari to provide guidance to law enforcement officers on the constitutional limitations on the use of tear gas and flash-bang grenades. These are not compelling reasons to grant the Petition. The Seventh Circuit faithfully applied this Court's standards in its qualified immunity analysis, and correctly rejected the defense. There is no circuit split on the use of tear gas and flash-bang grenades that needs to be resolved. And even if this Court were interested in discussing the constitutional limitations on the use of certain non-lethal

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the Estate filed a petition for rehearing *en banc*, which was also denied. *Id.*

weapons, this case presents a poor context in which to do so. The amount of force used and the manner in which it was deployed was clearly unreasonable, so any discussion confined to the facts of this case will be of little value in cases which present a closer call.

I. The Seventh Circuit appropriately applied this Court's precedent in affirming the denial of qualified immunity.

The Petition attempts to portray the Seventh Circuit's opinion as lowering the threshold for defeating a claim of qualified immunity.[5] The alleged departure is not found in the standard the Seventh Circuit cited in its opinion, App. 14-18, which the Petitioners concede states the applicable standard. Pet. 13. The Petitioners dismiss that as "boilerplate" and contend that the Seventh Circuit "fail[ed] to apply such standards to the issues here, instead utilizing a significantly lower standard to deny qualified immunity." Pet. 13. This is incorrect, as the Seventh Circuit's qualified immunity analysis is supported by precedent from this Court.

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[5] The Petitioners contend that the Seventh Circuit applied a "constitutionally impermissible qualified immunity standard." Pet. 12. There cannot be such a thing as a "constitutionally impermissible qualified immunity standard." The defense of qualified immunity arises from the common law, not from the Constitution. *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967), *Malley v. Briggs*, 475 U.S. 335, 339-40 (1986).

The Seventh Circuit opinion speaks for itself. Although it was unable to find Seventh Circuit precedent holding this precise conduct unlawful, the court did find other sources that gave the Petitioners sufficient warning that their conduct was unlawful, including: Seventh Circuit cases presenting similar, though not identical circumstances (App. 22-23); authority from another jurisdiction presenting extraordinarily similar circumstances (App. 23-25, 31) (discussing *Estate of Smith v. Marasco*, 318 F.3d 497 (3d Cir. 2003)); authority from other jurisdictions presenting similar, though not identical circumstances (App. 25-26, 31); and dicta from Seventh Circuit cases that gave Petitioners sufficient warning that their conduct was unconstitutional (App. 28-30). This Court has held that a plaintiff need not identify an identical or even "fundamentally similar" or "materially similar" case, *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). Furthermore, this Court has found it appropriate to look to the same types of sources as the Seventh Circuit utilized in determining the contours of the right alleged to have been violated. *See id.* at 742-43 (relying on factually similar though not identical controlling precedent and dicta from a case that "[gave] fair warning to [defendants] that their conduct crossed the line of what is constitutionally permissible"); *Wilson v. Lane*, 526 U.S. 603, 617 (1999) (plaintiff can overcome qualified immunity by presenting "cases of controlling authority in [its] jurisdiction at the time of the incident which clearly established the rule . . . [or] a consensus of cases of persuasive authority such that a reasonable officer

could not have believed that his actions were lawful.").

Based on its review of appropriate authority, the Seventh Circuit correctly concluded that the Petitioners were not entitled to qualified immunity. As to the use of tear gas, the court found that it was clearly established as of July 19, 2005 that the use of tear gas is unreasonable when:

> (1) attempting to subdue individuals as opposed to mass crowds; (2) when the individual does not pose an actual [immediate] threat; (3) when the individual is not holding hostages; (4) when the individual officers are not in the process of attempting to make an arrest; (5) when the individual is armed but merely suicidal as opposed to homicidal; (6) when the individual is not attempting to evade arrest or flee from the police; and (7) when the individual is incapacitated in some form.

App. 26. As to the flash-bang grenades, the court concluded that it was clearly established on July 19, 2005 that their use by Petitioners was unconstitutional. "[T]his case arises in precisely the circumstances that this Court and other circuits have sought to avoid by providing detailed guidance on when the use of flash bang devices is (and is not) appropriate under the Constitution." App. 33 (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Hanes v. Zurick*, 578 F.3d 491, 496 (7th Cir. 2009)).

The Petitioners did not have to guess whether a court might find their conduct unlawful. There was more than enough warning to tell them when and how they could appropriately use tear gas and flash-bang grenades to extricate a barricaded, suicidal individual for an emergency medical detention. There is nothing wrong with the approach taken by the Seventh Circuit or the outcome it reached.

In order to argue that there is a compelling reason to grant certiorari, the Petitioners attempt to manufacture a conflict between the Seventh Circuit decision and precedent from this Court. They accomplish this by pulling passages from the Seventh Circuit's opinions and pointing to them as examples of the "lower standard" employed by the court. Pet. 13-14. This is nothing more than obfuscation by the Petitioners. This particular trick relies on conflating the two distinct prongs of the qualified immunity test. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001) overruled on other grounds by *Pearson v. Callahan*, ___ U.S. ___, 129 S.Ct. 808, 818 (2009). The first prong of the *Saucier* test asks whether, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier*, 533 U.S. at 201. If the answer is affirmative, the second prong asks whether the right was clearly established. *Id.* The Petitioners contend that the Seventh Circuit lowered the standard for proving that a right was clearly established (prong two), but rely mainly on the Seventh Circuit's discussion of prong one.

The first two passages quoted by the Petitioners are found in a paragraph that begins, "Applying the *Graham* factors, and drawing all inferences in favor of the Estate . . . " App. 19. The *Graham* factors refer to *Graham v. Connor*, 490 U.S. 386 (1989), which is this Court's leading case on claims of excessive force under the Fourth Amendment. That these passages came in a discussion of the substantive law governing the Estate's claims (*Graham*), and use the phrase "drawing all inferences in favor of the Estate," makes it obvious that the Seventh Circuit was applying the first prong of *Saucier*.

In this case, it was not necessary for the Seventh Circuit to address *Saucier*'s first prong, as the Petitioners expressly limited their appeal to the second. *See* App. 15. However, the Seventh Circuit did address the first prong, perhaps because it was "difficult to decide whether [the] right was clearly established without deciding precisely what the constitutional right happen[ed] to be." *Pearson*, ___ U.S. ___, 129 S.Ct. at 818 (quoting *Lyons v. Xenia*, 417 F.3d 565, 581 (6th Cir. 2005) (Sutton, J., concurring)). Whatever the motivation, it was within the court's prerogative to examine the first prong. It was in this context that the Seventh Circuit wrote the first two passages that the Petitioners contend are "telling" examples of the court's lowered standard. *See* Pet. 18 (quoting App. 19, 20).

The other two passages quoted by the Petitioners come in the context of prong two, but they are not problematic. These passages, which note that

Marasco put the Petitioners on notice that their conduct could be found unconstitutional, Pet. 14, use language nearly identical to *Saucier*: "[I]f a violation *could be made out* on a favorable view of the parties' submissions, the next, sequential step is to ask if the right was clearly established." *Saucier*, 533 U.S. at 201 (emphasis added). The Petitioners contend that the quoted passages represent a departure from the qualified immunity standard because they would deny immunity not only when the conduct at issue was certainly unconstitutional, but also when the conduct was only possibly unconstitutional. Pet. 16-17. The Seventh Circuit's approach is not problematic. It comes directly from *Saucier* and recognizes that because qualified immunity is to be determined before the plaintiff establishes liability, the plaintiff has not yet proven his or her version of the facts, and even if those facts are actually proven, there still remains the question of whether the force used in that situation was excessive. This Court has never suggested that qualified immunity is only defeated in cases in which the plaintiff would be entitled to a directed verdict on liability. Rather, this Court has recognized that qualified immunity can be denied when there are still questions of liability under the plaintiff's version of the facts.

The Petitioners also object to the Seventh Circuit's reliance on dicta to demonstrate that the Petitioners' use of flash-bang grenades violated clearly established law. Contrary to the Petitioner's contention, there is nothing wrong with this approach.

In *Hope*, this Court reversed the Eleventh Circuit's decision granting the defendants qualified immunity, relying in part on dicta from prior cases that put the defendants on notice that their conduct was unlawful. *Hope*, 536 U.S. at 743 ("The reasoning, though not the holding, in a case decided by the Eleventh Circuit in 1987 sent the same message to reasonable officers in that Circuit."). *See also Pearson*, ___ U.S. ___, 129 S.Ct. at 818; *Hanes*, 578 F.3d at 496 ("[L]ucid and unambiguous dicta concerning the existence of a constitutional right can without more make a right 'clearly established' for purposes of a qualified immunity analysis.") (quoting *Wilkinson v. Russell*, 182 F.3d 89, 112 (2d Cir. 1999) (Calabresi, J., concurring)). Although the court did not find any case with identical facts, it reviewed other authority, including dicta, and found ample discussion on the constitutional limits on the use of flash-bang grenades, which was sufficient to give the Petitioners clear warning that their use in this situation was unconstitutional. App. 28-33.

In another attempt to paint the Seventh Circuit's decision as contrary to Supreme Court precedent, the Petitioners cite *Hope*'s discussion of *United States v. Lanier*, 520 U.S. 259 (1997). In *Lanier*, this Court held that the "fair warning" requirement for prosecutions under 18 U.S.C. § 242 (the criminal counterpart to 42 U.S.C. § 1983) is the same as the clearly established standard for qualified immunity under § 1983. 520 U.S. at 270-71. *Lanier* did not alter the qualified immunity standard. In fact, *Lanier*'s discussion of

this standard demonstrates the propriety of the Seventh Circuit's denial of qualified immunity. In *Lanier*, this Court stated, "we have upheld convictions under § 241 or § 242 despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Id.* at 269. *See also Hope*, 536 U.S. at 741 (rejecting a requirement that previous cases be "fundamentally similar" or "materially similar").

Particularly relevant to this case is *Lanier*'s discussion of the level of specificity at which the right must be identified in prior case law:

> This is not to say, of course that the single warning standard points to a single level of specificity sufficient in every instance. In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary. *See, e.g., Mitchell v. Forsyth*, [472 U.S. 511, 530-535, and n.12 (1985)]. But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already in the decisional law may apply with obvious clarity to the specific conduct in question, even though "the very action in question has [not] previously been held unlawful." *Anderson*, [483 U.S. at 640].

Lanier, 520 U.S. at 271. There is no doubt that the use of tear gas and flash-bang grenades by police against a barricaded, armed, suicidal individual whom the police are attempting to seize for purposes of an emergency mental health detention are analyzed under the Fourth Amendment's reasonableness standard. *Graham*, 490 U.S. at 388 ("[C]laims [that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other 'seizure' of his person] are properly analyzed under the Fourth Amendment's 'objective reasonableness' standard[.]"). Thus, the rights at issue in this case were not required to be defined at "a very high degree of factual particularity."

For this reason, the Petitioners' continuous repetition of the particular facts of this case – that Escobedo was armed, high on cocaine, and barricaded in his apartment – does nothing to prove that they are entitled to qualified immunity. This is not, as the Petitioners suggest, a case in which the law must have been previously established "under the peculiar circumstances presented." Pet. 22. This argument is nothing more than an appeal to impose the "fundamentally similar" or "materially similar" standards rejected in *Hope*. 536 U.S. at 742 (rejecting Eleventh Circuit's materially similar standard, finding that the circuit court's grant of qualified immunity under such a standard "exposes the danger of a rigid, overreliance on factual similarity").

The Seventh Circuit looked to appropriate sources and determined that, viewing the facts in the light

most favorable to the Estate, the law was clearly established, to an appropriate degree of specificity, that the Petitioners' conduct violated Escobedo's constitutional rights. In the end, the Petitioners' argument boils down to a contention that the Seventh Circuit "misappl[ied] . . . a properly stated rule of law[,]" which is not a compelling reason for granting certiorari. Sup. Ct. R. 10. The Seventh Circuit did not misapply the qualified immunity standard and properly denied the Petitioners qualified immunity for their use of tear gas and flash-bang grenades. The Petition should be denied.

II. The Court does not need to grant certiorari to discuss the general limits on police use of specific non-lethal weapons in the absence of a circuit split, and this case would be a poor vehicle to address the constitutional limits on the use of tear gas and flash-bang grenades.

In their plea for relief, the Petitioners suggest that certiorari should be granted so that this Court can address the constitutional limitations on the use of tear gas and flash-bang grenades: "Given the significance of these two non-lethal tools within the law enforcement community, certiorari should be granted so that officers may know the bounds of their use of both of these tactics." Pet. 28. The Court should reject this request.

To begin with, this Court does not need to address every new weapon that becomes popular with

police. Since *Graham*, it has been clear that the use of any weapon in the course of a seizure is governed by the Fourth Amendment's objective reasonableness standard. The Court need not go further and write a policy manual for every weapon used by the police, unless there are compelling circumstances, such as a circuit split. The Petitioners have not identified a circuit split on the use of tear gas or flash-bang grenades.

Even assuming that it would be beneficial for the Court to discuss the constitutional limitations on these two weapons, this case is a poor vehicle for that task. The Petitioners' conduct in this case – including their tactics leading up to the deployment of tear gas, the amount of tear gas used, and the manner in which the flash-bang grenades were deployed – was clearly unreasonable. Thus, any discussion of the use of these weapons confined to the facts of this case will give police officers little guidance on their use in closer cases.

The Petitioners themselves argue that this case presents "peculiar circumstances[.]" Pet. 22. This is true, though the situation here is not unique for the reasons the Petitioners cite – that Escobedo was suicidal, armed, high on cocaine, and barricaded in an apartment. Police confront those circumstances fairly regularly, even if they are not all present together. *E.g.*, *Mercado v. City of Orlando*, 407 F.3d 1152, 1156-61 (11th Cir. 2005) (police responding to report of attempted suicide, found subject in his kitchen with telephone cord wrapped around neck and holding

knife); *Marasco*, 318 F.3d at 501-03 (police responding to call encountered mentally ill individual who suffered from post-traumatic stress disorder armed and barricaded in his home); *Omdahl v. Lindholm*, 170 F.3d 730, 731-32 (7th Cir. 1999) (police responding to call regarding suicidal fifteen-year-old armed with hunting rifle); *Allen v. Muskogee County*, 119 F.3d 837, 839 (10th Cir. 1997) (police responding to call regarding armed, suicidal man); *Russo v. City of Cincinnati*, 953 F.2d 1036, 1039-41 (6th Cir. 1992) (police attempting to seize paranoid-schizophrenic patient to return him to psychiatric institution encountered the subject armed with knives and barricaded in his sister's apartment); *Holzman v. City of South Bend*, 2006 WL 2788587, *1-2 (N.D. Ind. Sept. 26, 2006) (police responding to call regarding individual who threatened to do "suicide by cop"; subject found in his apartment which was decorated with numerous knives and swords on the walls); *Wallace v. Estate of Davies*, 676 N.E.2d 422, 424-25 (Ind. Ct. App. 1997) (police responding to call regarding suicidal man, finding him in his apartment armed with shotgun).

What does make this case unique, and thus a poor vehicle for a more general discussion of the use of tear gas and flash-bang grenades, are the following: (1) that Escobedo had threatened no one but himself; (2) that the police cut off all communication with Escobedo before deploying tear gas; (3) the amount of tear gas used; and (4) the manner in which the tear gas and flash-bang grenades were deployed.

The Seventh Circuit cited these factors as examples of how clearly unreasonable the Petitioners' use of force was.

The Seventh Circuit noted that it was unreasonable to completely cut off all lines of communication before beginning the tear gas assault. This was an unusual step to take, considering that the officers intended to use the tear gas to force Escobedo out of the apartment. Cutting off communication makes it extremely difficult, if not impossible, for the barricaded subject to surrender to the police. Thus, the Seventh Circuit stated: "The unreasonableness of the decision [to use force against Escobedo] is further exacerbated by the breakdown in communication initiated by Defendants, the lack of violent history by Escobedo (confirmed by his counselor), and the lack of any hostages or threats to the public." App. 20. A situation like this, where the police negotiate for three or four hours before abruptly ending all communication and initiating a forceful seizure (utilizing both tear gas and flash-bang grenades), is not likely to recur.

The Seventh Circuit also focused on the amount of force used and the manner in which it was deployed:

> This scenario coupled with the amount of tear gas utilized by the Defendants, twelve times the incapacitating level of tear gas necessary, the use of flash bang devices within the tear-gas filled room, and the throwing of the flash bang device into a darkened

> room with no knowledge of the location of the individual inside that room could possibly create a violation that is so patent that no violator has even attempted to obtain an appellate ruling on it.

App. 20. The court further stated:

> [O]n the facts of this case, the officers' conduct in the use of the flash bang grenades so clearly exceeded the bounds of reasonableness in the circumstances that it cannot be said to lie near the 'hazy border between excessive and acceptable force' along which qualified immunity shields officers from liability for their snap judgments, if those judgments prove to be wrong upon further reflection.

App. 33; *see also* App. 35 (Manion, J., concurring in part and dissenting in part) ("I do believe that reasonable officials would have known that using twelve times the incapacitating quantity of tear gas to extricate a person at home alone who had only threatened to harm himself and was not suspected of committing a crime 'was unconstitutional without guidance from courts.'") (quoting *Gossmeyer v. McDonald*, 128 F.3d 481, 496 (7th Cir. 1997)).

These distinguishing factors make this case a poor vehicle for a discussion on the general constitutional limitations on the use of tear gas and flash-bang grenades. The issues in this case are of little use for exploring the delicate lines between appropriate

and inappropriate use. This is not a compelling reason to grant certiorari.

CONCLUSION

The Petition should therefore be denied.

Respectfully submitted,

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Supreme Court of the United States

OFFICER BRIAN MARTIN, OFFICER JASON BROWN, OFFICER SCOTT STRAUB, SERGEANT TIM SELVIA, SERGEANT KEVIN HUNTER, LIEUTENANT KEVIN ZELT, DEPUTY CHIEF MARTIN A. BENDER, and DEPUTY CHIEF DOUGLAS A. LUCKER, each in his individual capacity,

Petitioners,

v.

ESTATE OF RUDY ESCOBEDO (Deceased), RAQUEL HANIC, Personal Representative of Estate,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

A. The Seventh Circuit Applies An Impermissible Qualified Immunity Standard

Respondent's primary argument in opposing the Petition for Writ of Certiorari is that the Seventh Circuit correctly applied this Court's qualified immunity standards in holding that the officers here had "more than enough warning to tell them when and how they could appropriately use tear gas and flash bang grenades to extricate a barricaded, suicidal individual for an emergency medical detention." (Brief in Opposition at p. 15). Respondent suggests that the Petitioners attempt to "trick" this Court into concluding that the Seventh Circuit has departed from traditional qualified immunity standards which requires that officials be given fair warning that their conduct is unlawful. (Brief in Opposition at p. 15). However, no such trickery is employed.

Petitioner herself acknowledges that the Seventh Circuit relied upon dicta to conclude that the use of tear gas and flash bang grenades violated clearly established law. She suggests that reliance on dicta is permissible under this Court's qualified immunity standards citing as authority *Hope v. Pelzer*, 536 U.S. 730, 743 (2002). *Hope* involved a claim brought by inmates against prison guards alleging Eighth and Fourteenth Amendment violations when the inmate was handcuffed to a hitching post for long periods of time without being provided water or bathroom breaks. *Hope* arose in the Eleventh Circuit and this

Court made reference to a prior Eleventh Circuit case which placed officers on notice that the denial of drinking water to an inmate as punishment might be considered constitutionally impermissible conduct. This Court held that "the reasoning, though not the holding, in [that] case decided by the Eleventh Circuit in 1987 sent the same message to reasonable officers in that circuit." 536 U.S. at 743.

The prior Eleventh Circuit case was not dicta. Moreover, this Court observed that the prison guards were on sufficient notice and fair warning that their conduct might constitute cruel and unusual punishment because of binding Eleventh Circuit precedent, an Alabama Department of Corrections regulation, and a Department of Justice report advising as to the constitution infirmity of using a hitching post for punitive purposes. In light of all of those authorities, this Court held that a reasonable officer would be on notice that the use of a hitching post for an extended period of time was a constitutionally impermissible practice. As the officers had fair and clear warning that their conduct was unlawful, it was appropriate for the District Court to deny qualified immunity at the summary judgment stage. *Id.* at 745-46.

In sharp contrast here, the Seventh Circuit identified none of its decisions, under facts similar to those here, wherein it held that the use of tear gas and flash bangs was impermissible. "Dicta is particularly unhelpful in qualified immunity cases where we seek to identify clearly established law." *Hamilton v. Cannon,* 80 F.3d 1525, 1530 (11th Cir. 1996).

Respondent ignores her burden in overcoming qualified immunity, a burden which requires her to offer either "a closely analogous case or evidence that the defendants' conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from a court." *Lawshe v. Simpson,* 16 F.3d 1475, 1483 (7th Cir. 1994). *Brosseau v. Haugen,* 534 U.S. 194 (2004), discussed nowhere in Respondent's reply, emphasizes that identifying the clearly established right "must be undertaken in light of the specific context of the case, not as a broad general proposition." 534 U.S. at 198. In *Brosseau,* this Court reversed an appellate court determination that "general tests" set forth in the Court's Fourth Amendment jurisprudence gave officials fair warning that the conduct was unlawful. *Id.* at 199. This Court made clear that the general tests were not enough to give fair warning, nor was it an "obvious case" where general standards clearly established the answer without developed case law.

The Seventh Circuit failed to identify any factually similar cases which would satisfy the "fair-warning" standard which is this Court's standard to deprive an officer of the protection of qualified immunity. In *Hope,* Justice Stevens compared an officer's right to fair notice to the same right to fair notice a criminal defendant has when facing criminal charges. 536 U.S. at 201.

Respondent is critical of Petitioners' reliance upon *Hope,* arguing that the "fair warning" discussion in *United States v. Lanier,* 520 U.S. 259 (1997),

referenced in *Hope* does not alter the qualified immunity standard and, in fact, demonstrates that the Seventh Circuit applied a correct standard. Although this Court in *Lanier* held that a factual situation does not have to be "fundamentally similar" so as to provide fair warning, this Court emphasized that where a Court relies upon general rules, "a very high degree of prior factual particularity may be necessary." 520 U.S. at 271.

Lanier therefore supports Petitioners' argument that the Seventh Circuit erred in relying upon general propositions, dicta, and cases with very little factual similarity to conclude that the officers had "fair warning" that the use of tear gas and flash bangs was unconstitutional under the circumstances they faced. The Seventh Circuit frames the qualified immunity inquiry as being whether the questioned conduct was "clearly forbidden" by existing law. *Wernsing v. Thompson,* 423 F.3d 732, 739 (7th Cir. 2005), *cert. denied,* 547 U.S. 1004 (2006). By not relying upon cases to place the officers on notice that their conduct was "clearly forbidden," the Seventh Circuit departs from this Court's well-settled qualified immunity analysis, abandoning that analysis in favor of a significantly lesser standard.

The lesser standard employed by the Seventh Circuit, if permitted to stand, effectively eliminates the application of qualified immunity in all but the most clear-cut of cases. The lesser standard contravenes this Court's admonition in *Saucier v. Katz,* 535 U.S. 194, 205 (2001) that reasonable mistakes are

entitled to the protection of qualified immunity. Under the Seventh Circuit's standard, qualified immunity would become the exception rather than the rule even where there are no cases to place officers on fair notice and warning that their conduct was constitutionally prohibited. As a result, certiorari should be granted to address the Seventh Circuit's significant departure from traditional qualified immunity analysis.

B. The Absence Of A Split In The Circuits Is Not Necessary For This Court To Grant Certiorari To Address Whether The Law Was Clearly Established As To The Use Of Tear Gas And Flash Bang Devices

Respondent suggests that certiorari is inappropriate because Petitioners do not point to a split in the circuits as to the use of tear gas and flash bangs. No authority is cited for the proposition that a split of authority is a prerequisite to this Court granting certiorari.

The Seventh Circuit cited not a single case which would have placed the officers on fair notice and warning that their conduct in deploying tear gas, or the amount of tear gas deployed in order to drive the suicidal Escobedo out of his high rise apartment, was clearly unlawful. Likewise, the Seventh Circuit Majority Decision relies upon nothing more than dicta and *Estate of Smith v. Marasco,* 318 F.3d 497 (3rd Cir. 2003) to hold that the law was clearly

established as to the use of flash bang devices under the circumstances presented by this Court. The Seventh Circuit Majority Decision does so to the exclusion of its own controlling precedent, *Molina v. Cooper,* 325 F.3d 963 (7th Cir. 2003). *Molina* holds that it is not unreasonable for officers to use flash bang devices when they believe the only occupant of a dwelling is armed, and the officers had ample reason to be concerned about their personal safety. As Judge Manion wrote in his dissent, under the circumstances "The flash-bang devices may have been their safest option." (App. 44).

CONCLUSION

The Seventh Circuit creates a new qualified immunity standard, a standard significantly lower than the firmly established "fair warning" standard espoused by this Court on numerous occasions. Certiorari is needed to correct this error and make clear under what circumstances the use of tear gas and flash bangs may be used by police when confronting a barricaded, suicidal suspect with a gun, who is high on cocaine and refuses to voluntarily exit his high rise

apartment after more than three hours of negotiations with the Emergency Response Team.

Respectfully submitted,

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